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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1894.

EX PARTE,
EUGENE V. DEBS ET AL.,
Petitioners.

No. 11.
Original.
Habeas Corpus.

Argument for Petitioners.

S. S. GREGORY,
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ARGUMENT FOR PETITIONERS.

The bill on which the injunction was granted, for violation whereof the petitioners were imprisoned, was filed in the name of the United States on the 2d day of July, 1894, in the Circuit Court of the United States for the Northern District of Illinois, and on the same day the writ was ordered and issued. The bill was brought to restrain interference with the running of trains carrying mail and interstate freight and passengers on all the railroads running out of Chicago. Its allegations need not now be more particularly stated than to say that it set out a conspiracy between petitioners Debs, Howard, Rogers and Keliher, with others, to interfere with and hinder the transportation of the mails and interstate traffic on these roads, purported to be brought under the direction of the attorney-general alleged a purpose on the part of the defendants to secure to themselves control of this traffic (Trans. 8) and was otherwise obviously framed to meet the requirements of the anti-monopoly act of July 2, 1890.

The petitioners, Hogan, Burns, Goodwin and Elliott were not parties to the bill. The injunction will be hereafter stated with particularity.

An information was filed against Debs, Howard, Rogers and Keliher on the 17th of July, and on the 1st of August another information, called a supplemental information, bringing in also the other petitioners and one J. F. McVean. Against the latter, however, no judgment was pronounced. This second information would seem to be irregular, but no time will be spent in discussing this. The two informations are in their essential features substantially alike and the first one only will therefore be examined in considering whether any violation of the injunction is alleged.

The petitioners contend that the bill stated no case cognizable in chancery and that therefore the injunction and the interlocutory decree therefor were void. This involves three propositions: first, that without statutory authority from Congress the government could maintain no such bill; second, that no such authority can be found, and in particular, that the act of 1890, already referred to, is inapplicable; third, if it be applicable then that section 4 thereof, authorizing such proceedings, is unconstitutional, as an attempt to commit the enforcement of a penal statute to the chancery, and thus to deprive those charged with its violation of trial by jury contrary to the sixth amendment to the Constitution, and probably, also, although offenses against the act are declared to be misdemeanors only, to that clause of section 2, article 3, which declares that "the trial of all crimes, except in cases of im-"peachment, shall be by jury."

I.

Before discussing these questions, however, it may be proper to consider the information and discuss briefly the proper construction of the injunction to determine whether these petitioners were charged with a violation of it. Notwithstanding what has been said by this court in *In re Coy*, 127 U. S. 731, and other cases it is supposed that on *habeas corpus* this question is open. If an indictment in a Federal court states no

offense against the laws of the United States a judgment pronounced upon it could not justify imprisonment.

This is the fair import of the cases.

Thus in *Ex parte Parks*, 93 U. S. 18, while it was held that mere failure in an indictment to state with technical accuracy an offense charged in substance against the laws of the United States could not be availed of on *habeas corpus* Mr. Justice Bradley quoted with approval (p. 22) the language of Chief Baron Gilbert from Bacon's Abr., as follows:

"If the commitment be against law, as being made by one "who had no jurisdiction of the cause, or for a matter for "which by law no man ought to be punished, the court are "to discharge." The last clause puts an obvious limitation on the principle suggested against this view. That also is involved in the decisions which hold that proceedings under an unconstitutional statute may be thus examined and quashed. A law thus invalid is no law.

If no federal law exists making that an offense charged in an indictment, this court clearly may so declare and must hold that the court below had no jurisdiction to put the defendant on his trial. Where this is held on the ground that the Federal statute relied on is unconstitutional, two questions are necessarily involved and determined; first, that the statute under examination is thus invalid; second, that there is no other statute under which the proceedings in question can be sustained. In any case where there is no statute authorizing punishment for the offense stated, this objection is clearly open on *habeas corpus*. If the indictment, for example, state a clear case of offense against local municipal law, but not against Federal law, a Federal court could not try it.

In *Ex parte Siebold*, 100 U. S. 371–6, Mr. Justice Bradley again quoted the language of Chief Baron Gilbert as already given and said: "The latter part of this rule when applied to "imprisonment under conviction and sentence, is confined to "cases of clear and manifest want of criminality in the mat-"ter charged, such as in effect to render the proceedings "void."

In *Ex parte Carll*, 106 U. S. 521–3, it is said: "The

"second ground of application presents no jurisdictional ques-
"tion. The indictment charged the prisoner with a crime
"against the laws of the United States, *United States* v. *Mari-*
"*gold*, 9 How. 560. We have nothing to do with questions
"arising on the evidence presented to sustain the charge."
In that case the indictment was examined for the purpose of determining this question.

In the late case *In re Lancaster*, 137 U. S. 393, the court declines, in advance of trial, or motion to quash, to examine the validity of the indictment. "In this posture of the case "we must decline to interfere." (p. 395.) The distinction between such an application and this is plain.

In the still more recent case of *United States* v. *Pridgeon*, 153 U. S. 48–59, where the question was as to whether the venue of the offense was clearly laid, this court, by Mr. Justice Jackson, said:

"If the indictment does not fairly and sufficiently aver that
"the offense in question was committed in the Cherokee Out-
"let, it certainly does not show affirmatively upon its face
"that it was committed elsewhere, and without the jurisdic-
"tion of the court. It may be that, upon demurrer or writ of
"error, the indictment might have been found defective in
"not alleging with greater certainty the particular locality in
"which the offense was committed, within the rule laid down
"in *McBride* v. *The State*, 16 Humph. (Tenn.) 615, but it
"can not be properly held that the indictment is so fatally de-
"fective on its face as to be open to collateral attack after
"trial and conviction, or that the sentence of the court pro-
"nounced thereon was void.

"The *habeas corpus* proceeding being a collateral attack of
"a civil nature, it must clearly and affirmatively appear that
"the indictment charged an offense of which the court had no
"jurisdiction, so that its sentence was void. This does not
"appear in the present case, and the second question certified
"must therefore be answered in the negative."

This is undoubtedly the correct rule, and the decisions of this court which seem to contain *dicta* to the contrary should not be regarded as impairing it.

The common law authorities are not valuable on this point, because as indicated by Mr. Justice Bradley in *Ex parte Parks, supra*, persons convicted of crime were excluded from the privilege of the writ, both before the *habeas corpus* act and by its terms, and ordinarily it appears that the return to the writ only showed the commitment or sentence. Tested indeed by the rule of the common law, the judgment of contempt in this case is wholly insufficient, and the government is not entitled to have the principle that on *habeas corpus* the indictment is not before the court applied. Thus it is said in Comyn (Vol. 4, p. 333):

"But a return is insufficient if it does not show an express "and certain cause of commitment. 2 Inst. 55, R. Vau. 137. "Where a man is committed for any crime, either at common "law or by act of Parliament, for which he is punishable by "indictment, a return that he was committed *till discharged* "*by due course of law* is good. But if the commitment be in "pursuance of a special authority, the terms of the commit- "ment must be special, and exactly pursue that authority; "and therefore, if it do not appear on the return, to have "been according to that authority, the return will be bad.

"2 Bl. Rep. 806–7.

"As if a return be *that the commitment was for a con-* "*tempt of the court of chancery* without showing wherein "the contempt was.

"Mo. 839–840.

* * * * * * *

"Or *for a contempt of a command*. Mo. 839. Or *a con-* "*tempt contrary to an order or decree of the court*. Mo. 839. "* * * Or *for ill behavior or words to the privy coun-* "*cil*, without saying what words. R. Cro. Car. 133."

The sentence in this case merely adjudges petitioners "guilty of contempt in disobeying the mandates of an in- "junction issued herein on the second day of July, A. D. "1894," and imposes imprisonment. Tested under these authorities it is void absolutely and can only be sustained by reference to the record.

Such ought to be the law, for no power is more arbitrary

and hostile to liberty than the power to imprison for contempt. It can only be vindicated upon the doctrine of absolute necessity. This is surely a dangerous justification if not always "the tyrant's plea." As the law seems now to stand, a single Federal judge can try a party on a charge of contempt and imprison him without limit. If jurisdiction exist there is no review.

It would aggravate this situation to say that not only shall there be no review as to the guilt of the party charged with contempt but no scrutiny as to whether that with which he is charged is a contempt for which the court may lawfully punish.

No such arbitrary power should be permitted in any court. In the States of the Union generally for all criminal contempts not committed in the presence of the court there can after sworn answer by the defendant denying the contempt be no punishment inflicted in that proceeding. Thus the right to trial by jury on a criminal charge is preserved. In civil or private contempts, and as such the court below treated this, there is full right of appeal and review as in other cases.

Lester v. *The People*, 150 Ill. 408–422.

Where the question was fully and learnedly examined on the authorities.

In Coy's case already referred to Mr. Justice Miller, observed, p. 758: "So, while we have attempted to answer the "main argument of prisoners' counsel, that Congress had no "power to punish an act not specially intended to affect the "election of a member of Congress, though the act was done "with a felonious intent, and that if it had such power it has "not exercised it, we thought it not necessary, under the prin- "ciple laid down in *Ex parte Watkins*, to inquire into the suf- "ficiency of the allegation of the more minute details of the "offense as charged in the indictment."

The court on *habeas corpus* and by *certiorari* can always, where it has supervisory power as this court has, in respect of the Circuit Courts, examine the entire record. Note to *Commonwealth* v. *Lecky*, 26 Am. Dec. 37–40.

The stipulation of the parties in virtue of which certain parts of the record are printed as exhibits to the petition affords like opportunity to the court in this case. It was supposed that on entry of the rule to show cause why the writ of *habeas corpus* should not issue, *certiorari* would go to bring up the record. If this is necessary it is asked that it may now issue and that a copy of the record which was left with the clerk, be filed as a return thereto.

On *habeas corpus* by persons sought to be extradited the Federal courts always look into the indictment to see whether an offense against the laws of the United States is charged.

In re Terrell, 51 Fed. R. 213, per Lacombe, C. J.
In re Greene, 52 Fed. R. 104, per Mr. Justice Jackson, then Circuit Judge.

In this opinion are cited many cases, including
Horner v. *U. S.*, 143 U. S. 214.

If this question is open on such proceedings lest a prisoner be taken to a distant place and put upon trial, when no such case is stated against him, much more should it be examinable by this court after trial and judgment where no appeal or writ of error lies and to prevent the execution of an illegal and unwarranted sentence of imprisonment against which no other remedy exists.

The views contended for here are recognized in Church on *Habeas Corpus*, Sec. 367, where numerous cases are cited, and also Sec. 245.

Certainly the question can not here be raised whether the violation of an injunction is stated with all the precision and particularity which would be required in an indictment inspected on error. But if the information on its face shows that the petitioners only did that against which they were not enjoined, then a judgment establishing their guilt of that which was no violation of the injunction, affords no lawful authority for their detention. The court had no jurisdiction on such a finding, to imprison.

In this respect the case is like
Ex parte Lange, 18 Wall. 163.
Ex parte Nielsen, 131 U. S. 176.

This court now has appellate jurisdiction in error in certain criminal cases and undoubted supervisory jurisdiction over the judgments both of the District and Circuit Courts. Those courts are of limited jurisdiction; and the public interest requires that this court freely exercise its powers to keep them within the limits prescribed by the Constitution and Federal legislation. These petitioners have been by the court below adjudged guilty, but of what? Merely of those things with which they stand charged in the information; of nothing else. Clearly if a person were in a Federal court convicted on an indictment charging him with a perfectly lawful act he could not legally be sentenced to imprisonment; yet all that is said as to the jurisdiction of the court to pass on the indictment and decide as to its sufficiency would be just as applicable to such a case as to this. The reasons why this should be permitted as to informations for contempt, both in favor of liberty and on authority have been already suggested.

It is thought that these are cogent and convincing, and that unless this court regards the information as stating a violation of the injunction, the petitioners will be discharged.

II.

The injunction, omitting the formal portion, enjoins the defendants and all other persons combining and conspiring with them, and all other persons whomsoever, to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of the following named railroads, to wit (naming them), as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying passengers or freight between or among the States, and from in any manner interfering with, hindering or stopping any train carrying the mail, and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling-stock of any of said companies engaged in interstate commerce, or in

connection with the carriage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce, or in the carriage of the mails of the United States, or the transportation of passengers or freight between or among the States and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States; and from injuring or destroying any part of the tracks, roadbed or road, or permanent structures of said railroads, and from injuring, destroying or in any way interfering with any of the signals or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, or locking or in any manner fastening any of the switches of said railroad, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the States or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force or violence, any of the employes of any of said railroads to refuse or fail to perform any of their duties as employes of any of said railroads in connection with interstate business or commerce of such railroads or the carriage of United States mail by such railroads, or the transportation of passengers or property between or among the States; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence,

any of the employes of said railroads who are employed by such railroad, and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States to leave the service of such railroads, and from preventing any persons whatever, by threats, intimidation, force or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States. And from doing any acts whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

It is unquestioned that by this injunction if the court had power to issue the same at all the defendants are restrained from any forcible interference with the trains, cars, engines, switches, tracks and other property of the railroads named, from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence, any of the employes of said railroads to leave the service, and from preventing any persons whatever by threats, intimidation, force or violence from entering the service of said railroads, and from compelling or inducing by threats, intimidation, force, violence or persuasion any of the employes of said railroads to refuse to perform any of their duties as such.

The principal question for consideration is whether the general words "from in any manner interfering with, hindering, obstructing or stopping any of the business of said railroads as common carriers," etc., extend the specific clauses of the injunction in respect to the particular subject-matter or manner of interference, covered by such specific clauses, or, to state the contention in particular and concrete form, whether when

the defendants are in express terms enjoined from inducing or attempting to induce by *force, threats, intimidation* or *violence*, any of the employes of such railroads to leave the service, they are by the general words quoted further enjoined from inducing or attempting to induce such employes to leave the service by pursuasion or advice.

It would seem that the mere statement of such a proposition carried a sufficient refutation. It is a rule of construction so well settled that the citation of cases would be idle, that general words are never permitted to extend the meaning of particular words within the special scope or field of such particular words. Supposing a case infinitely stronger than this, that the language were, "induce by force, threats, violence or "intimidation, or any other means;" by the unquestioned line of authority the words "or any other means" would be restricted to matters *ejusdem generis* with force and violence, and would not be construed to include persuasion.

Thus, where landlords were authorized by statute to distrain for rent "all sorts of corn and grass, hops, roots, fruits or other product whatsoever which shall be growing on any part of the estates demised," it is held not to include shrubs and plants growing in a nursery garden.

Clark v. *Gaskarth*, 8 Taunt. 431.

Where it was enacted that "no tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any labor, business or other work upon the Lord's Day," it is so held not to include a farmer. *Fenwick* v. *Smalz*, L. R. 3 C. P., 315, or drivers of stage coaches. *Reg.* v. *Cleworth*, 4 B. & S. 927, or an attorney. *Sandiman* v. *Breach*, 7 B. & C. 96.

Where a statute provides that "every person who shall set fire to any building or to any other material with intent to cause such building to be burned, or shall by any other means attempt to cause such building to be burned, shall be punished," etc., it was held that this provision contemplated the use of some physical means analogous to the setting fire mentioned at the beginning of the section, and did not include an attempt by mere solicitation, the court saying that in constru-

ing statutes general terms are subordinated by preceding particulars.

McDade v. *People*, 29 Mich. 50.

Where a statute prohibited the obstruction of a road by fence, bar or other impediment, the cutting of a ditch so that water will flow across the road and thus obstruct it, is not within the statute.

Commonwealth v. *Killian*, 109 Mass. 346.

See also:

Prim v. *State*, 36 Ala. 245.

R. R. Co. v. *Smith*, 52 Wis. 140, is very similar to this case. That case was an attachment for contempt for the violation of an injunction. The defendant was enjoined to desist and refrain from in any way or manner interfering with the construction of a bridge by plaintiff, or from cutting the piles being there driven, or doing any act of any kind to hinder, delay, impede or prevent the contractor and his employes from performing such work. The defendant obtained from another court a temporary injunction restraining the contractor from proceeding with the work. Held by the Supreme Court that the order must be understood as restraining the defendant from forcibly interfering only, and that he was not guilty of contempt.

Again, in matters of contempt the court will look at what the defendants might reasonably be expected to apprehend the prohibition of the injunction to be, and where the terms of the injunction alleged to be violated are ambiguous, so that the defendant might in good faith be misled, he will not be guilty of contempt.

United States ex rel., etc., v. *A., T. & St. Fe Ry.*, 16 Fed. Rep. 853.

And while under the strictest rule of law the particular words of the injunction can not be extended as to the manner in which employes might not be induced to leave, yet apart from that consideration it is inconceivable that any defendant, knowing the omission of the word "persuasion" in the clause

under consideration in connection with the use of such word in the preceding and analogous clause prohibiting the inducing of employes to refuse to perform their duties while in the service, could reach any other conclusion than that persuasion was permitted in the one case while forbidden in the other.

If the injunction does prohibit the inducing of employes to leave the service or to refuse to enter into the employment of railroad companies by persuasion and advice, it is hard to conceive how it could have been drawn the better to disguise that fact.

It was suggested by the court below, in the course of argument, at an early stage of this case, that because of the illegal character of the enterprise which the defendants were alleged to be engaged in, their acts of persuasion and advice even partook of such illegality, and might be properly enjoined by the court. It is sufficient for the purpose of this discussion to say that the defendants can not be found guilty of contempt, simply because their acts were illegal. It must appear that they have done some act, legal or illegal, directly forbidden by the injunction of the court. Whatever may be the power of the court to enjoin the defendants from advising men to quit work under the circumstances of this case, it did not do so, and, however much the general words of the injunction may cover unlawful obstruction of the business of railroad companies, where particular words enumerate the means by which men may not be induced to leave their employment, general words, not mentioning that particular subject-matter, can not be construed to forbid other means of inducing men to leave, though such other means may be an unlawful interference with railroad business. The general words of the injunction undoubtedly forbid all unlawful interference of a kind outside the different subject-matters covered by the particular clauses, but no such acts are alleged or pleaded, and for the practical purposes of this case the scope of the injunction is precisely that of its particular clauses.

As to the true construction of the last clause in the injunction, "and from doing any act whatever in furtherance of "any conspiracy or combination to restrain either of said rail-

"road companies or receivers in the free and unhindered con-
"trol and handling of interstate commerce over the lines of
"said railroads and of transportation of persons and freight
"between and among the States; and from ordering, direct-
"ing, aiding, assisting or abetting in any manner whatever,
"any person or persons to commit any or either of the acts
"aforesaid," some suggestions may be made.

It has been argued that the general language enjoining the defendants and all persons combining and conspiring with them from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of certain named railroads is limited by the special or particular clauses as to interference with their employes so that if the particular restraints imposed by those clauses were observed there would be no breach of the injunction by conduct which in the absence of these clauses might have been considered as within the general inhibition aleady referred to.

As for instance an attempt to persuade employes to quit the service of one of the railways named, would not be regarded as within the first clause, because in the clause particularly applicable to this kind of interference, the prohibition was only against "compelling or inducing, or attempting to "compel or induce by threats, intimidation, force or violence, "any of the employes of any of said railroads," from leaving service.

While by the concluding clause the language enjoining from doing any act in furtherance of any conspiracy or combination to restrain the railroads in the free control of interstate commerce, etc., is general, this is likewise to be regarded as limited by the particulars in the former part of the writ, so that it should read as follows: "And from doing any act whatever "in furtherance of any conspiracy or combination to restrain "*in the manner aforesaid* either of said railroads," etc.

Certainly, as the court below said, this would at least raise the question of ambiguity; and such a doubt is fatal to this proceeding. But more than that, it seems most reasonable that the defendants having been restrained from certain prescribed interference with the railroads, the office of this clause

was to similarly restrain them, having conspired to so interfere, from doing any overt act in pursuance of such conspiracy. This certainly would be all that could properly have been done and must be considered all that was done. If this contention is sound, it is not perceived that the government has any plausible case; for the information does not charge the defendants with violence or overt act.

And on this point the opinion of the Circuit Court of Appeals for the Seventh Circuit in the Northern Pacific strike case (*Arthur* v. *Oakes*, 63 Fed. R., 310,) seems to clearly sustain the construction contended for. The original injunction which, for the purposes of this argument, it is alone necessary to consider, is stated in the opinion as follows:

"By a writ of injunction dated December 19, 1893, the officers, agents and employes of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all persons, associations and combinations, voluntary or otherwise, whether in the service of the receivers or not, were enjoined.

"From disabling or rendering in any wise unfit for convenient and immediate use any engine, cars, or other property of the receivers.

"From interfering in any manner with the possession of locomotives, cars or property of the receivers or in their custody.

"From interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the receivers or with men employed by them to take the place of those who quit.

"From interfering with or obstructing in any wise the operation of the railroad or any portion thereof, or the running of engines or trains thereon as usual.

"From any interference with the telegraph lines or the receivers along the lines of railways operated by them, or the operation thereof."

"From combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody or embarras-

"sing the operation of said railroad, and from so quitting the "service of said receivers, with or without notice, as to cripple "the property or prevent or hinder the operation of said "railroad; and generally,

"From interfering with the officers and agents of the re- "ceivers or their employes in any manner by actual violence "or by intimidation, threats or otherwise, in the full and com- "plete possession and management of the railroad, and of all "the property thereunto pertaining, and from interfering "with any and all property in the custody of the receivers, "whether belonging to them or to shippers or other owners, "and from interfering, intimidating or otherwise injuring or "inconveniencing or delaying the passengers being transported "or about to be transported over the railway of the receivers "or any portion thereof, or by interfering in any manner by "actual violence or threat and otherwise preventing or en- "deavoring to prevent the shipment of freight or the trans "portation of the mails of the United States over the road op- "erated by the receivers until the further order of this court."

Construing the clause restraining the defendants from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, the court, speaking through Mr. Justice Harlan, said:

"The general inhibition upon combinations and conspiracies "formed with the object and intent of crippling the property "and embarrassing the operation of the railroad, must be con- "strued as referring only to the acts of violence, intimidation, "and wrong of the same nature or class as those specifically "described in the previous clauses of the writ. We do not "interpret the words last above quoted as embracing the case "of employes who, being dissatisfied with the proposed re- "duction of their wages, merely withdraw on that account "singly or by concerted action, from the service of the re- "ceivers, using neither force, threats, persecution, nor intimi- "dation toward employes who do not join them, nor any de-

"vice to molest, hinder, alarm or interfere with others who "take or desire to take their places."

And again:

"These employes having taken service first with the com- "pany and afterward with the receivers under a general con- "tract of employment which did not limit the exercise of "the right to quit the service, their peaceable co operation, "as the result of friendly argument, persuasion, or conference "among themselves, in asserting the right of each and all to "refuse further service under a schedule of reduced wages, "would not have been illegal or criminal, although they may "have so acted in the firm belief and expectation that a sim- "ultaneous quitting without notice would temporarily incon- "venience the receivers and the public. If in good faith and "peaceably they exercise their right of quitting the service, "intending thereby only to better their condition by secur- "ing such wages as they deem just, but not to injure or inter- "fere with the free action of others, they can not be legally "charged with any loss to the trust property resulting from "their cessation of work in consequence of the refusal of the "receivers to accede to the terms upon which they were "willing to remain in the service. Such a loss, under the "circumstances stated, would be incidental to the situation "and could not be attributed to employes exercising lawful "rights in orderly ways, or to the receivers who in good "faith and in fidelity to their trust declared a reduction of "wages and thereby caused dissatisfaction among employes "and their withdrawal from service."

Accordingly the court read into this clause an additional provision construing it as "referring only to acts of violence, "intimidation and wrong, of the same nature or class as those "specifically described in the previous clauses of the writ."

This great case declares the constitutional right of employes to quit work singly or in concert; or at least the constitutional wrong of attempting by injunction to compel involuntary servitude.

It is to be hoped that this court may give the stamp of its

authority to this proposition. The fact that it was ever questioned or denied is significant and remarkable.

The entire subject of the control of strikes and organized efforts of laboring men to better their condition was fully and learnedly examined and all the authorities reviewed in a paper read by Mr. Charles Claflin Allen, of St. Louis, before the American Bar Association at its last meeting.

17 Rep. Am. Bar Ass'n. 299.

The author's notes show most exhaustive research and are of the greatest value as a collection of authorities.

A careful analysis of the information will show that it alleges neither violent interference with railroad property, intimidation of employes nor incitement thereto. It charges that the Railway Union, which is alleged to be a voluntary association, or its directors or officers had, on the 26th or 27th of June, directed all its members in service of the Illinois Central Railroad company, to strike or leave the service of the company, and that in pursuance thereof, they did, in a body leave the service of said company for the avowed purpose of hindering, etc., said company, in the operating of trains engaged in the transportation of the mail and interstate commerce.

It also alleges that after service of the injunction, the work of organizing local unions of the parent union was continued, for the express purpose of conferring authority upon that union to order strikes; that the orders for strikes and for railway employes to "leave in a body," were generally communicated by telegram from Debs to officers of local unions, and then copies of numerous telegrams are inserted, which do not change in any way the general aspect of the pleading. Suffice it to say they neither advise nor counsel violence or intimidation in any way, but frequently contain counsels against violence.

The information then alleges that in pursuance of said orders and directions many of the employes of the railways named in the injunction were "induced to leave the service of "said railway companies;" and it is further alleged that as a direct result of said order for said strikes, violence followed

which is briefly described, following which, is this allegation:

"And the court is further respectfully informed that the "said defendants had full knowledge that many of such violent "acts upon the part of the strikers or ex-employes of the rail-"roads were perpetrated prior to the service of said writ of in-"junction, and notwithstanding such knowledge and the further "knowledge that violence invariably follows all strikes of a sim-"ilar character, said defendants, in willful violation of the or-"der of said court, daily and continuously, after the service of "said writ of injunction issued their orders and directions for the "employes of said railways to leave such service in a body, and "also continued such orders while the said mobs were in partial "possession of said railroads, and engaged in forcible resistance "of the orders of this court and its officers."

There is no allegation that the defendants contemplated bringing about this violence, counseled it in any way or intended it. This pleading was framed to meet the decision of Judge Jenkins in the Northern Pacific Strike case,

Farmers L. & T. Co. v. *N. Pac. R. Co.*, 60 Fed. R. 803,

which holds all strikes to be unlawful.

The injunction was treated as forbidding these defendants to encourage, advise, counsel or direct, not violence or intimidation, but a strike. The opinion of the court below proceeded on that theory. Thus at p. 756 (64 Fed. R.) the court says:

"As officers of the American Railway Union, it is beyond "question that the defendants had practical control of the "strike, guiding as they chose the movements of the men "actively engaged." Again, p. 757:

"Strikes by railroad employes have not been infrequent of "late years in this country, and the testimony of the one wit-"ness who spoke on the subject, and whose experience and in-"telligence made him apparently quite competent to speak "accord with what I suppose to be common knowledge that "they have been attended generally, if not in every instance, "with some form of intimidation or force. * * * The in-"ference, therefore, is a fair one, aside from direct evidence to "the point, that they expected and intended that this strike

"should differ from others only in magnitude of design and "boldness of execution, and that the accustomed accessories "of intimidation and violence, so far at least as found essential "to success, would not be omitted. For that much the strik- "ing workmen, acting on the promptings of self-interest, "*without instigation or direct suggestion, and even in spite* "*of admonitions to the contrary may ordinarily be counted* "*on.*" There is much more of like tenor, but this is enough. How the learned judge who wrote it can reconcile it with the decision in *Arthur* v. *Oakes*, 63 Fed. R. 310, it is difficult to understand.

In his comment upon that case he criticises (p. 763) the statement of counsel that in this country a man has the right to quit work for a good or bad reason, and another like liberty to counsel him to do so. It is said this is not so because otherwise a servant might quit his place and another advise him to do so to permit robbery of his master. But in that case would the learned judge entertain a bill to enjoin such quitting or advice? And it was in that sense counsel spoke when he said the right referred to existed. It was held, Mr. Justice Harlan, speaking for the court, in the case just cited, and being doubtless quite as familiar with the general character of strikes as the learned court below that men could not be enjoined from striking. The court below agrees but adds at various places in his opinion, in substance, that if they strike after injunction, violence is sure to follow, and for that they will be sent to jail for contempt of court and to the penitentiary for conspiracy. If this can be established as the settled law of the land the privilege of striking will be of doubtful value.

By such a declaration this court will turn over the workingmen of this country, bound hand and foot, to the mercy of corporate rapacity and greed in a time when combination rules every market and every great enterprise and dominates all the activities of capital. The effect will be either to break the spirit of American wageworkers until they sink to a dull level but little above that of the dumb beasts; or else by confining and restraining dynamic social forces until they gather an accumulated and resistless energy by such compression,

precipitate an explosion which shall wreck social order. It is idle to disguise or to dodge the question. This injunction was aimed at a strike; these men were imprisoned because they were leaders of a strike.

The workingmen of this country wait on the judgment of this court to learn whether the last poor weapon they have against the oppressions which they know exist, because they feel them, is to be wrested from them. That is the labor question presented in this case. It is most important, most urgent. It demands the fullest discussion, the most profound consideration. But the field is so broad and the other questions in this case so serious and so fundamental, that it can only be here imperfectly stated, and this argument must, in the main, proceed upon other points.

A few suggestions, however, may be submitted as to the general aspects of the question.

The fundamental proposition on this branch of the case is that railroad employes may strike, may combine for that purpose, encourage and persuade, establish organizations having that object, and constitute leaders to guide them in accomplishing it, though the necessary effect of such a course is to interfere with and hinder the operation of railroads and to some extent to disable them from carrying the mails and interstate commerce. This right is constitutional, at least, to the extent that it can not be restrained in chancery, and if exercised in violation of contract or even under such circumstances as to be unlawful, remedy other than injunction must be sought. To such an effort as was made in the Northern Pacific case to apply the remedy by injunction the language of a recent article in the London Law Times, is justly applicable.

"The tremendous powers of government and control over "the lives and fortunes of American citizens which may be "claimed and exercised, are well shown in a case which, at the "beginning of this year caused much surprise in England, both "to lawyers and the public; the strike of the employes of the "receiver of the Northern Pacific Railway, in consequence "of a notice of reduction of wages. Between three and four "thousand workingmen determined to quit work in conse-

"quence. Two weeks before the new schedule was to come "into effect, the receivers obtained from the circuit judge an "injunction restraining the men and their unions from 'com- "bining and conspiring to quit with or without notice, the "service of the roads.' The scope of injunctions is wider in "America than with us; but this extraordinary endeavor, "whether under the head of contempt of court or as an as- "sumption of jurisdiction to compel the specific performance "of contract service, could not be passed by without protest. "It was really placing large masses of workmen engaged upon "great industrial undertakings under a slavery regime."

97 London Law Times, 384-5.

Nor in this connection should the language of Judge Cooley, in his recent address before the American Bar Association, be overlooked.

"The personal liberty of both the employer and the laborer "is necessarily to be respected, and every man must be left to "determine for himself whether he will observe and perform "such moral or sentimental obligations, or recognize such "claims, as the State has never deemed it wise to convert into "legal duties or legal rights. Upon these and kindred sub- "jects a true leader may make the inherent difficulties so plain "that destructive conflicts will become inexcusable and also "uncommon. He can clearly show that boards of arbitration "with their orders, and I may add also courts with their in- "junctions, if they heed the fundamental law of the land, can "no more hold men to involuntary servitude, for even a "single hour, than can overseers with the whip."

The learned court below quotes the language of one of the petitioners that a strike is war as indicating that the action of the petitioners went beyond participation in a peaceable quitting of work.

This idea is not original with Debs. It is expressed in substantially the same language by Sir James Fitz James Stephen in his work on the Criminal Law of England, Vol. 3, pp. 218-9. Such a strike or state of war, the learned judge below concurring in the opinion of Mr. Justice Harlan in the Northern Pacific case certainly held not to be necessarily

illegal. Of course a strike is war—industrial conflict—so is all business. It is a conflict waged mercilessly, remorselessly—*vae victis esse* is the cry of modern trade and commerce. Stupendous and cunningly devised schemes are constantly undertaken for the purpose of crushing out competition and if necessary ruining a competitor. But the courts recognize and are compelled to sustain such efforts within certain bounds but illy defined.

Mogul S. S. Co. v. *McGregor*, 66 L. T. Rep. 1 (H. of L.)

Violence is incident to demonstrations which are not thus unlawful *per se*. The celebration of the 4th of July, elections in large cities, religious lectures and many similar events have been and are frequently marked by incidents of violence.

The sale of intoxicating liquors is followed by a long train of evils and almost every form of law breaking—yet in most of the States and at common law, it is a lawful occupation, and one pursuing it is not liable civilly or criminally, except by express statute for these unfortunate and inevitable consequences.

The right to strike can not be exercised with any prospect of advantage to the laborer without organization and leaders, and the latter must have and exercise the usual office of leader.

In the exercise of this lawful right they only are liable for violence who participate in or by incendiary counsels incite it. In the great Homestead lockout of 1892, the proprietors of those works could not be held civilly nor criminally liable for their refusal to employ their men at wages demanded. So of any other lockout; so of any strike. For if violence, as alleged in the information, invariably follows a strike, and therefore a strike may be enjoined as such, because of its inevitable and attendant results, strikes are unlawful *per se*, and are, according to the new gospel of "Government by Injunction," abolished in the eye of the law.

It is time that this question should be met and settled; that the law should be plainly declared by this court and as this court ever declares the law, not with quibble and qualifica

tion and legal casuistry, but clearly, broadly and honestly, so that a net shall not be spread to catch the unwary in the future.

III.

If an order of a court is void as beyond the power of the court to make it, its disobedience is not contempt. It may be so void because the court had no jurisdiction to hear and determine the case, or, because having such jurisdiction, the court lacked organic power to make the particular order in question.

Ex parte Fisk, 113 U. S. 713–18–9.
In re Sawyer, 124 U. S. 200, 220–1–2.
Ex parte Terry, 128 U. S. 289.
Windsor v. *McVeigh*, 93 U. S. 274 282–3.
Kerfoot v. *People*, 51 Ill. App. Ct. 409.

IV.

It may be well first to say something as to the right of the government to maintain this bill in virtue of its supposed property right in the mails. These are carried by the goverment in the exercise of a sovereign function—with this equity has no concern, for it may not be invoked in matters political, for the enforcement of the criminal law nor for the protection of other than strictly property rights.

In re Sawyer, 124 U. S. 200.
Cope v. *Fair Association*, 99 Ill. 489.
World's Columbian Exposition v. *U. S.*, 56 Fed R. 654.

The authority of the Federal government over the transportation of the mails is derived from Art. I, Sec. VIII, Sub. 7, of the Constitution: "Congress shall have power to establish post offices and post roads." This grant is construed to authorize not merely the designation of the routes by which the mail shall be carried and the offices where letters and other documents shall be received for forwarding and distri-

bution, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit.

Ex parte Jackson, 96 U. S. 727.

It will be observed that this is not a delegation of power to the government to act upon the subject, but a delegation of power to *Congress* to *legislate* upon it. The government can, therefore, have no powers, rights or remedies in respect to the mail except such as Congress by act creates.

Congress has acted for the protection of the mails by providing penalties for obstruction (Sec. 3995, Revised Statutes), for conspiracy to obstruct the mails. (Sec. 5440 Revised Statutes.) Congress has provided fully for the protection of the government and for indemnity against loss by requiring bond and security from the carriers procuring mail contracts. (Sec. 3941 to 3963 Revised Statutes.)

In the exercise of the exclusive powers of Congress, the failure of Congress to legislate and provide regulations and restrictions upon any branch of the subject-matter, is equivalent to a declaration that no regulation shall be made, and that the subject in question shall be untrammelled save as by Congress provided. See under the power to regulate commerce.

Welton v. *Missouri*, 91 U. S. 275.
Robbins v. *Shelby Taxing Dist.*, 120 U. S. 489.

When by the constitution the power over a subject-matter is delegated to Congress, one of the three co-ordinate departments of the government, neither the other departments nor the government itself have any authority, rights or remedies in respect thereto, except in exact pursuance of an act of Congress. When the power to establish and control the mail system is given to Congress, and Congress in pursuance of that authority establishes certain specific remedies, the government is absolutely concluded by the opinion of Congress that such remedies are sufficient and can pursue no other. It matters not what authority the government might have at common law, or what authority Congress might have under the constitution. The power of the government is derived solely from

the delegation of the people, and in case of a constitutional delegation to Congress of a power, and the enactment by Congress of certain laws in pursuance thereof, the power of the government is precisely the same as it would be had the constitution delegated to it power in the exact words of the congressional enactments.

It is provided by act of Congress that mail shall not be carried by private parties, and this enactment is enforced by criminal penalties. It was proposed to institute a civil action against parties carrying the mail to recover the loss of revenue sustained by the government, but it was held by the attorney-general that the government was limited for the protection of its monopoly in the carriage of the mail to the remedy provided by Congress, viz., a criminal prosecution, and could pursue no civil action without statutory authority.

4 Op. Att'y Gen., 349.

The principal of this opinion is decisive of the right of the government to maintain a proceeding in equity for the protection of mails without authority conferred by statute.

In *Little* v. *Barreme*, 2 Cranch 169, Congress, in pursuance of the war power, authorized by statute the seizure of any vessel sailing *to* a port of France, etc. The president, by proclamation, instructed the captains of ships of war to seize such vessels proceeding *to* or *from* such ports, and in pursuance of such proclamation a vessel was seized proceeding from a French port. Mr. Chief Justice Marshall said that although the president was commander of the navy, yet under the constitution his power was limited to the act of Congress, and afforded no protection when unauthorized by its terms.

In *Norton* v. *Brewster*, 23 Fed. 849, a petition was presented to the Circuit Court for a rule in the nature of mandamus against certain judges of a federal election, to compel the correction of fraudulent registration. It was objected that the court had no jurisdiction in the premises as there was no delegation of authority by congressional enactment. The circuit judge said: "The jurisdiction of this court must appear of "record and be derived from congressional enactments. "There is no statute conferring jurisdiction in a matter of the

"kind now before me. Under title 26 of the Revised Statutes, "the Circuit Court is given jurisdiction in certain elections to "appoint supervisors. Under the title 'Crimes,' the Circuit "Court is given jurisdiction to try violations of the laws of "the United States relating to the election of members of "Congress. Further than as given by these two titles the "Circuit Court has no jurisdiction in the matter of elections. "It is clear that the court is without jurisdiction and the peti- "tion is dismissed."

The courts of the United States are distinctively courts of limited jurisdiction. The disposal of the judicial power belongs to Congress, and the courts can not exercise jurisdiction without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the constitution might warrant. Both the constitution and an act of Congress must concur in conferring power upon the Circuit Court. A considerable portion of the judicial power placed at the disposal of Congress has been intentionally permitted to lie dormant, by not being called into action by law.

Sheldon v. *Sill*, 8 How. 441.
Bank v. *De Veaux*, 5 Cranch. 61.
Osborne v. *Bank*, 9 Wheat. 738.

Upon this question the case *In re Barry*, 42 Fed. 113, is very exhaustive. Application was made to the Circuit Court of New York for a writ of *habeas corpus ad subjiciendum* to determine the custody of an infant. It was held that by the common law of England and of the United States, in virtue of the authority of the sovereign, the writ of *habeas corpus* will issue to determine the right to the custody of an infant as between parents who are living apart; that the government of the United States has no inherent common law prerogatives, but possesses only such as are conferred upon it by the constitution, and therefore has no power to interfere with citizens by virtue of authority deducible from the general nature of sovereignty; that the Circuit Courts of the United States have not, as incident to their constitution, any common law jurisdiction, but possess no other jurisdiction than that concur-

rently conferred by the Constitution and Congress of the United States.

The court says: "Does this common law prerogative vest in the government of the United States, and has the Circuit Court competent authority to exercise it? The argument bearing upon the first branch of this inquiry assumes two propositions as its basis: (1), that the government of the United States is supreme over all subjects within its cognizance; and (2), that the common law of England is embodied with and has become a measure and source of authority to the national government, and is to be enforced in the Circuit Courts whenever persons competent to sue therein prosecute their rights in such courts. It is believed that neither of these propositions can be maintained. Many of the powesr of the general government are unquestionably supreme and exclusive, while others are only concurrent with similar powers possessed by the State government. Nor do all the attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the States in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant."

McCulloch v. *Maryland*, 4 Wheaton, 407.
Rhode Island v. *Mass.*, 12 Peters 657.

The jurisdiction of the United States courts depends exclusively upon the constitution and laws of the United States, and they can neither in civil nor criminal cases resort to the common law as a source of jurisdiction.

In re Barry, supra.
U. S. v. *Hudson*, 7 Cranch. 32.
U. S. v. *Coolidge*, 1 Wheat. 415.
Chisholm v. *Georgia*, 2 Dallas, 432.
Ex parte Bollman, 4 Cranch. 75.
Town of Pawlet v. *Clark*, 9 Cranch. 333.
Ex parte Randolph, 2 Brock 477.
Craig v. *Missouri*, 4 Peters 444.

Orleans v. *Phoebus*, 11 Peters 175.
Kendall v. *U. S.*, 12 Peters 544.
U. S. v. *Bevans*, 3 Wheat. C. C. 336.
Moffet v. *Solely*, 2 Paine 103.
Harrison v. *Hadley*, 2 Dill. 229.
Hubbard v. *Ry.*, 3 Blatch. 84.
Shute v. *Davis*, Pet. C. C. 432.

And this principle applies as well to the Circuit Courts as to the Supreme Court of the United States. See cases *supra*.

The distinction established by the cases is clear and practical, and embraces all courts alike, and is in effect that the courts of the United States derive no jurisdiction from the common law, and in those cases where jurisdiction is conferred by statute the procedure and remedies are to be according to the course of the common law.

Bains v. *The James and Catherine*, 1 Baldw. 558.
Robinson v. *Campbell*, 3 Wheat. 223.
Ex parte Kearney, 7 Wheat. 38.
Mead v. *Beale*, Taney 339.

In *Ex parte Bollman*, *supra*, Mr. Chief Justice Marshall says: "Courts which originate in the common law possess a "jurisdiction which must be regulated by the common law until "some statute shall change their established principles; but "courts which are created by written law, and whose jurisdic-"tion is defined by written law, can not transcend that jurisdic-"tion. It extends in the case of United States courts only to "the power of taking cognizance of questions between indi-"viduals or between the government and individuals. To en-"able the court to decide upon such question the power to de-"termine it must be given by written law."

In re Barry, *supra*, was affirmed by the Supreme Court upon appeal (5 Howard 103), and the opinion of the Circuit Court was published with the Supreme Court reports at the request of the Supreme Court. (136 U. S. 597; 10 Sup. Ct. Rep. 850.)

The relation of the government to the mails, and the existence of a property right therein, are to a great extent im-

material to the question above, for whatever that relation or property right may be it is derived solely from the constitutional provision mentioned and the enactments of Congress by virtue thereof, and can therefore be protected only by Congress and in the manner by statute provided. The existence of a property right in the mail is briefly discussed in the case of *Searight* v. *Stokes*, 3 How. 151, which was a case arising under a contract that vehicles laden with the property of the United States should be exempt from tolls upon a bridge in Virginia. It was held that United States mail coaches carrying the mails were within the exemption, and upon this subject Mr. Chief Justice Taney, says: "The United States have unquestionably a property in the mail. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road consists of communications to or from the officers of the executive department or members of the legislature on public service or in relation to matters of public concern."

In a dissenting opinion Mr. Justice McLean says: "The mail of the United States is not the property of the United States. What constitutes the mail? Not the leathern bag, but its contents. A stage coach of mail bags could not be called the mail. They might be denominated the property of the United States, but not the mail. The mail consists of packets of letters directed to certain post offices for distribution or delivery, and whether these be conveyed in a bag or out of it, they are equally the mail; but no bag without them is, or can be called the mail. Can these packets be said to be the property of the United States? The letters and their contents belong to individuals. No officer of the government can abstract from the mail, a letter not directed to him without incurring the penalty of the law. They in no sense belong to the United States and are never so denominated. If a letter be stolen from the mail which contains a bank note, the property in the note is laid in the person who wrote the letter in which the note is enclosed."

In a separate dissenting opinion, Mr. Justice Daniel says: "The word 'mail' is universally comprehended as being that over which the government has the management for the purpose of conveyance, and it would strike the common understanding as somewhat singular that the money or letters belonging to the citizens, and for the transportation of which he pays, are not his property but the property of the United States."

Moreover, if the government can be conceived as having any personal property interest in the mails, as distinguished from the sovereign right, it can not be protected by injunction, (1) because the control and protection of the mail is committed by the constitution to Congress, and Congress has not seen fit to provide such a remedy for its protection; (2) because no irreparable injury appears. Close attention is necessary upon this point to distinguish between the injury of the mails, and the injury to its property rights, if any such exist.

There is no allegation in the bill of injury to mail bags or other government property or of a loss of revenue, and it is difficult to conceive what pecuniary property injury the government suffers by the obstruction complained of. But if such injury is suffered Congress has made provision for adequate indemnity by providing for security from the contractors against all loss. (See Sec. 39 41 *et seq.* Rev. Stat.) It is averred in complainant's bill in this case that the railroads therein mentioned were bound by contract to carry the mails without delay, and for any pecuniary loss the government may sustain, it has a full and adequate remedy at law against the railroad companies and their surety. There is no question raised by the bill as to a multiplicity of suits to enforce such remedy, or of the insolvency of such companies or sureties.

Equity jurisdiction, particularly in the case of injunction, is in its nature a form of legislation. It is justified upon the theory that the law making power, if applied to, would have, in good conscience, established an equitable rule, and it is only permitted to act when the legislative power is silent. The absence of irreparable injury, or in other words, the existence of a plain and adequate remedy at law is fatal to equit-

able jurisdiction. Where the injury complained of is one for which a plain and adequate remedy is afforded at law, the United States courts can not take jurisdiction of a bill in equity for relief.

Graves v. *Insurance Co.*, 2 Cranch 419.

The absence of a plain and adequate remedy at law is the test of jurisdiction in equity, and the application of this principle must depend on the character of the particular case as disposed by the pleadings.

Watson v. *Sutherland*, 5 Wallace 74.

If there is a remedy at law, the party has a constitutional right to a jury trial.

Parker v. *Woolen Co.*, 2 Black 545.

In *Bonaparte* v. *Railroad Company*, 1 Baldwin 218, Justice Baldwin says: "There is no power, the exercise of which "is more delicate, which requires greater caution, deliberation "and sound discretion, or is more dangerous in a doubtful case "than the issuing of an injunction. It is the strong arm of "equity that ought never to be extended unless to cases of "great injury where courts of law can not afford an adequate or "commensurate remedy in damages. The right must be clear "and the injury impending so as to be averted only by the pre-"ventive process of injunction. But that will not be awarded "in doubtful cases, or new ones not coming within well estab-"lished principles, for if it issues erroneously an irreparable in-"jury is inflicted for which there can be no redress, it being the "act of a court not of the party. It will be refused till the "court are satisfied that the case before them is of a right about "to be destroyed or irreparably injured, or great and lasting in "jury about to be done by an illegal act."

The rule that equity has no jurisdiction where there is an adequate remedy at law, has, in the Federal jurisprudence, been declared by statute.

Sec. 723, Rev. Stat.

Francis v. *Flinn*, 118 U. S. 385, was an action for an injunction to restrain the defendants, members of the Pilots'

Association of New Orleans, from interfering with plaintiff, operator of a pilot boat.

Mr. Justice Field says: "If the plaintiff has a right to "pilot vessels with his boat, and is wrongfully interfered with "by the defendant or others, he can prosecute them for the "wrong. If his vessel is arrested in its passage without lawful "warrant, he can bring the defendants before the court to "answer for their conduct. If his pilots are duly licensed and "they are hindered or prevented from the exercise of their "business, both he and they have the same means of redress "which are afforded to every citizen whose rights are invaded "or obstructed. * * * If a court of equity could interfere "and use its remedy of injunction in such cases, it would draw "to itself the greater part of the litigation properly belonging "to courts of law."

It is upon this same principle that equity can not interfere when the legislative power has, by penal act, prohibited and punished the acts in question. Upon this reason rest the cases declaring the rule that equity will not enforce the criminal law, that this extraordinary power, available only in the absence of law, will not enforce positive statutory law carrying penalties of fine and imprisonment for its violation. (3.) By sections 3995 and 5440 of the Revised Statutes, the obstruction of the mails and conspiracies to that end are made penal offenses against the United States, and equity will not enforce the penal law by enjoining persons from the commission of criminal offenses.

Therefore, when a bill identical with this, except as to names, was before the Circuit Court of the United States for the District of Indiana, Baker, D. J., said:

"Prior to the 2d day of July, 1890, it is entirely clear that "the United States, as a municipal corporation, had no power "either by petition or bill to go into the courts of equity of "the United States and invoke the aid of those courts by their "restraining powers to prevent interference with the carriage "of the mails, or with the carriage of interstate commerce. "Prior to that time the sole remedy was on the criminal side "of the court. The sole method in which the United States

"as a government could prosecute violators of the law, who "interfered with the carriage of mails or interfered with the "instrumentalities used in the conduct of interstate commerce "was, by indictment, or information, on the criminal side of "the court," etc.

U. S. v. *Agler*, Fed. R. 824.

A brief filed in the court below by Mr. W. W. Erwin and Mr. W. A. Shumaker, of Saint Paul, who appeared also for the defendants has been freely drawn upon by the writer in discussing the construction of the injunction and the right of the government to maintain this bill in respect of the mails.

IV.

The bill in other aspects shows no case cognizable in equity. It can not be maintained on general principles of equity irrespective of the anti-monopoly act of July 2, 1890.

As a bill by the sovereign to restrain a nuisance or purpresture it will not lie.

Before proceeding to the consideration of the exact question in this case it may be well to notice briefly some cases in which the jurisdiction in chancery to restrain and abate public nuisances is discussed. But it must be remembered that they are only partially applicable here. The government has no such general police power of which this form of public control is a part as the Crown in England or the States of the American Union, and such power as it has is reposed in the Congress. The courts and executive officers of the government can not take the initiative. They must await legislative action and are then limited to the procedure prescribed by Congress.

In an early case in New York, Chancellor Kent discussed and fully stated the jurisdiction of the chancery upon information by the attorney general, commented on the English cases, and held that the jurisdiction was exceedingly limited and to be sparingly and cautiously exercised.

Attorney-General v. *Utica Ins. Co.*, 2 Johns. Chy. 371.

In a much later case in Massachusetts the cases in England and elsewhere are fully stated, and it is said:

"This court sitting in equity, does not administer punish-
"ment or enforce forfeitures for transgressions of law; but
"its jurisdiction is limited to the protection of civil rights,
"and to cases in which full and adequate relief can not be had
"on the common law side of this court or of the other courts
"of the commonwealth."

Att'y-Gen'l v. *Tudor Ice Co.*, 104 Mass. 239.

And also:

"The only cases in which informations in equity in the name
"of the attorney-general have been sustained by this court
"are of two classes. The one is of public nuisances, which
"affect or endanger the public safety or convenience, and re-
"quire immediate judicial interposition, like obstructions of
"highways or navigable waters (citing cases). The other is of
"trusts for charitable purposes, where the beneficiaries are so
"numerous and indefinite that the breach of trust can not be
"effectively redressed except by suit in behalf of the public."
p. 244.

In another case in the same State the court observed:

"A court of equity will not interfere when the obstruction
"to the rights of the public is of such a character that it may,
"with equal facility, be removed by other constituted au-
"thorities and public officers. *Attorney-General* v. *Bay State*
"*Brick Co.*, 115 Mass. 431–438. There must be a want of
"adequate, sufficient remedy, and the injury to public rights
"must be of a substantial character, and not a mere theoreti-
"cal wrong.

Attorney-General v. *Metropolitan Railroad*, 125 Mass. 515–16.

An instructive case narrowly limiting the jurisdiction in such cases and holding particularly that equity can not be invoked in aid of penal law is,

State v. *Ehrig*, 14 Mo. App. 413.

In this case Judge Thompson has made a valuable collection of authorities. In a New Jersey case it is said:

"It would seem, at first, incongruous and improper for this "court to interfere in cases of public nuisance. The very fact "that nuisances of that character are offenses against the com- "munity, and necessarily sources of criminality in a greater or "less degree, would seem to distinguish them as matters not "proper to be dealt with by this court. But the jurisdiction "of chancery, to a certain extent, in cases of public nuisance, "appears to be admitted, although it has rarely been exercised. "It is asserted by Lord Hardwicke, in *Baines* v. *Baker*, Amb. "159; 3 Atk. 750, and is considered as existing by Lord El "don in the case of the *Attorney-General* v. *Cleaver*, 18 Ves. "211. He speaks with caution upon the subject, as though it "were new, but not disputed ground."

Attorney-General v. *New Jersey Railroad Co.*, 3 N. J. Eq. 136-9.

In another case the court said: "And because the remedy "by indictment is so efficacious, courts of equity entertain ju- "risdiction in such cases with great reluctance, whether their "intervention is invoked at the instance of the attorney-gen- "eral, or of a private individual who suffers some injury "therefrom, distinct from that of the public, and they will "only do so when there appears to be a necessity for their "interference."

Att'y-Gen. v. *Brown*, 24 N. J. Eq. 89-92.

In a later case it is said: "The jurisdiction of courts of "equity to redress the grievances of public nuisances is also es- "tablished beyond doubt, but at the same time it is also settled "that, in the absence of some special and urgent reason, equity "will not exercise that jurisdiction where the object might be "as well attained in the ordinary tribunals; and where the "grievance is a misdemeanor subject to indictment, equity "will interfere with great reluctance, even though its inter- "vention be sought by the attorney-general, and then only "to prevent a very serious public injury."

Township of Raritan v. *R. R. Co.*, 49 N. J. Eq. 11-16.

It is said by this court that "a bill in equity to abate a public

"nuisance filed by one who has sustained special damages, has "succeeded to the former made in England of an information "in chancery, prosecuted on behalf of the Crown, to abate or "enjoin the nuisance as a preventive remedy. The private "party sues rather as a public prosecutor than on his own ac- "count; and unless he shows that he has sustained and is still "sustaining individual damages, he can not be heard. He "seeks redress of a continuing trespass and wrong against him- "self, and acts in behalf of all others, who are or may be in- "jured."

Miss. & Mo. R. R. Co. v. *Ward*, 2 Black 485-92.

In the argument below some suggestion was made that even though the Circuit Courts of the United States sitting in equity might entertain a bill at the instance of the attorney-general to enjoin obstructions of navigable waters, it did not follow that such a bill would lie to enjoin obstructions to railways as highways of interstate traffic. It was said that these were the subject of private ownership and under the direct control of large interests able to protect their rights in this regard.

To this the court below would not at all agree although he did not base his judgment on contrary views resting it wholly on the act of 1890. But at least it would seem to be safe to say that if such a bill or information would not lie in respect of the navigable waters of the United States, in the absence of legislation, then it could not be maintained as to railroads. On the argument below counsel for the government cited cases where a bill by the government to enjoin obstruction of or interference with navigable waters had been sustained.

Those cases probably will be found on examination to be cases where the government being engaged under congressional sanction in improving the navigation of navigable waters a bill by the government was entertained to enjoin the frustration and defeat of its efforts in this direction.

The government has long been engaged in dredging and deepening the Calumet river near Chicago. It can not be doubted that to protect a *quasi* property interest thus involved

the government would be entitled to maintain a bill to enjoin those who were filling up the river as fast as under governmental authority it was dredged out. This is not so much on the theory of abating a public nuisance, for the proceeding is not an information in the name of the attorney-general, as on that of a suit to protect what may justly be regarded as a property interest of the government. Such a case was *United States* v. *Duluth*, 1 Dill. 469; also *United States* v. *Mississippi, etc., Boom Co.*, 3 Fed. Rep. 548. (Nelson of Minnesota.)

In this case it is said: "It is true that ordinarily where a "right, common to all is abused, or so used as to cause dam- "age, the injured party must seek redress by an action at "law; but where congress has assumed jurisdiction of a river "in the interest of commerce, I think it not doubtful that the "equitable arm of the court can furnish relief against any "threatened injury to any improvements made under its "authority."

These improvements were made and paid for by the government and were strictly property; as much so as a light-house. In this connection may also be read with profit the interesting and luminous opinion of Judge Bunn, of Wisconsin, in *Heerman* v. *Beef Slough Mfg. Co.*, 1 Fed. R. 145. In this decision the paramount authority of Congress to control commerce and navigation on navigable streams is clearly asserted, but the authority of a State over such as are within her borders, is, in advance of congressional action, justly admitted.

The case which perhaps goes farthest in favor of the principle urged by counsel for the government, though they did not cite it, is *United States* v. *North Bloomfield Gravel Min. Co.*, 53 Fed. Rep. 625 (Gilbert, Circuit J., 9th Circuit). There it is held that where a balance of a congressional appropriation for the improvement of certain rivers in California was not to be used until certain hydraulic mining, hurtful to navigation had ceased on such rivers and in the event of its continuance, the secretary of war was authorized to institute legal proceedings to prevent it, such legislation was sufficient to confer upon the Federal courts, jurisdiction to enjoin at the

suit of the United States the continued deposit in such rivers of mining debris injurious to navigation. This is on the theory as appears by the opinion (pp. 628–9), first, that here is a statutory proceeding distinctly prescribed by Congress to prevent a public nuisance; and second, that whether maintainable on this ground or not it should be sustained in order to restrain acts which would interfere with and depreciate the value of improvements provided for by Congress.

But it appears from these and other cases, presently to be cited, that even as to navigable waters, courts, representing the judicial power of the nation, can not take the initiative and attempt to protect and regulate interstate and foreign commerce. This power is delegated to Congress—the legislative branch, and when, and not until that body has acted, the courts may proceed, and then only on the lines prescribed by legislative authority. Where the government has a property interest a source of jurisdiction is found, as also where a definite statutory procedure is authorized. Therefore lacking these elements, the courts of the United States have no general supervisory jurisdiction over navigable waters in aid of sovereign or governmental authority, such as is possessed by the courts of England. Ours is a government of limited and delegated powers; to Congress the constitution commits the power to regulate commerce between the States and between this and other nations. As to matters local in their character, which the regulation and abatement of obstructions in navigable waters within a State certainly are, the jurisdiction of the State attaches and controls until Congress acts.

> *Transportation Co.* v. *Parkersburg*, 107 U. S. 691–700.

At pp. 701–2, Mr. Justice Bradley *inomen clarum et venerabile*, says:

"Now, wharves, levees and landing-places are essential to "commerce by water, no less than a navigable channel and a "clear river. But they are attached to the land; they are "private property, real estate; and they are, primarily at least "subject to the local State laws. Congress has never yet in- "terfered to supervise their administration; it has hitherto

"left this exclusively to the States. There is little doubt, "however, that Congress, if it saw fit, in case of prevailing "abuses in the management of wharf property—abuses mate- "rially interfering with the prosecution of commerce—might "interpose and make regulations to prevent such abuses "When it shall have done so, it will be time enough for the "courts to carry its regulations into effect by judicial proceed- "ings properly instituted. But until Congress has acted, the "courts of the United States can not assume control over the "subject as a matter of federal cognizance. It is Congress, "and not the judicial department to which the constitution "has given the power to regulate commerce with foreign na- "tions and among the several States. The courts can never "take the initiative on this subject.

"There are cases, it is true, which are so national in their "character, and in which it is so essential that a general or "national rule should exist, that any interference by the State "legislatures therewith is justly deemed to be an invasion of "the power and authority of the general government; and in "such cases the courts will interpose to prevent or redress the "commission of acts done or attempted to be done under "authority of such unconstitutional laws. In such cases, the "non-action or silence of Congress will be deemed to be an "indication of its will that no exaction or restraint shall be "imposed."

While that point in the discussion has not yet been reached, how applicable this language is to the right of way of a railroad which is as strictly private property as a wharf and not more essentially an instrument of commerce nor more fully subject to national control nor more firmly impressed with important public trusts (and see also *United States* v. *New Orleans*, 10 Pet. 662). Therefore, it is held, that until Congress acts as to the matter of obstructions in navigable waters the Federal courts have no jurisdiction.

Kenyon v. *Krupe*, 46 Fed. R. 309–314 (Knowles of Washington). So tenaciously is this principle adhered to, that it is held Congress can not delegate its power in this regard. *United States* v. *Bridge Co.*, 45 Fed. R. 178, per Shiras, J.:

and in a comparatively recent case in the Supreme Court the same great judge whose language is quoted above, discussed this question and settled it to the satisfaction of the intelligent student of Federal jurisprudence on a firm and rational foundation.

Willamette Iron Bridge Co. v. *Hatch*, 125 U. S. 1–8.

"The power of Congress to pass laws for the regulation of "the navigation of public rivers, and to prevent any and all "obstructions therein is not questioned. But until it does "pass some such law, there is no common law of the United "States which prohibits obstructions and nuisances in naviga- "ble rivers, unless it be the maritime law, administered by the "courts of admiralty and maritime jurisdiction. No prece- "dent, however, exists for the enforcements of any such law; "and if such law could be enforced (a point which we do not "undertake to decide), it would not avail to sustain the bill in "equity filed in the original case.

"There must be a direct statute of the United States in "order to bring within the scope of its laws, as administered "by the courts of law and equity, obstructions and nuisances "in navigable streams within the States. Such obstructions "and nuisances are offenses against the law of the States "within which the navigable waters lie, and may be indicted "or prohibited as such; but they are not offenses against "United States laws which do not exist; and none such exist "except what are to be found on the statute book. Of course, "where the litigant parties are citizens of different States, the "Circuit Court of the United States may take jurisdiction on "that ground, but on no other. This is the result of so many "cases, and expressions of opinion by this court, that it is al- "most superfluous to cite authorities on the subject. * * *

"Of course any interference with the operations, construc- "tions or improvements made by the general government, or "any violation of a port law enacted by Congress, would be "an offense against the laws and authority of the United "States, and an action or suit brought in consequence thereof "would be one arising under the laws of the United States. "But no such violation or interference is shown by the alle-

"gations of the bill in the original suit in this case, which "simply states the fact that improvements have been made in "the river by the government, without stating where, and "that Portland had been created a port of entry. In the case "of *Escanaba Co.* v. *Chicago*, it was said: 'As to the appro- "priations made by Congress, no money has been expended on "the improvement of the Chicago river, above the first bridge "from the lake, known as the Rush street bridge. No bridge, "therefor, interferes with the navigation of any portion of the "river which has been thus improved. But, if it were other- "wise, it is not perceived how the improvement of the naviga- "bility of the stream can affect the ordinary means of crossing "it by ferries and bridges.' 107 U. S. 690. In the present "case there is no allegation, if such an allegation would be "material, that any improvements in the navigation of the "Willamette river have been made by the government at any "point above the site of the proposed bridge."

That was a suit by the bridge company to obtain by a bill of review, the reversal of a decree enjoining the construction of their bridge rendered in a suit by individuals claiming property rights. And the opinion disposed of the case on the ground that the court had no jurisdiction under federal law to entertain the suit in which the injunction was granted, and that result is reached by a process of reasoning which is here applicable and quite conclusive.

Acting on this theory Congress, in the river and harbor act of 1890, extended national authority over the navigable waters of the country, and by Sec. 10 made the creation of any obstruction in navigable waters without authority of law a penal offense, and then provided that "the creating or con- "tinuing of any unlawful obstruction in this act mentioned "may be prevented and such obstruction may be caused to "be removed by the injunction of any Circuit Court exercis- "ing jurisdiction in any district in which such obstruction "may be threatened or may exist; and proper proceedings to "this end may be instituted under the direction of the At- "torney-General of the United States."

26 Sts. at Large, 454–5.

Congress having plenary authority in the premises this legislative action is of great significance. It is not, like some acts of Parliament, declaratory of the common law; for there is no common law of the United States. It is rather a solemn legislative enactment that there was when this act was passed no law on the subject; and that this law should be the measure and source of executive and judicial authority over the matter to which it pertains.

And it may be noted in passing that under this act it has been held that a mere temporary obstruction of a navigable stream by logs or rafts does not come within its terms.

United States v. *Marthinson*, 58 Fed R. 765.

It is easy, also, to show that at common law jurisdiction of the chancery on information of the attorney-general to restrain a purpresture or nuisance, rests largely on the idea that the king owns the land whereon it exists; therefore in the absence of Congressional action the initiative properly rests with the State which owns the soil under its navigable waters.

Attorney-General v. *Richards*, 2 Anstr. 603, where it was said as quoted by the Supreme Court in *Coosaw Mining Co.* v. *So. Carolina*, 144 U. S. 250–565, that "where the king claims "and proves a right to the soil, where a purpresture and nui- "sance have been committed, he may have a decree to abate "it."

In that case the Supreme Court accordingly sustained a bill of that general character brought in the name of the State of South Carolina on the relation of a State Board of Commissioners in right of its sovereignty and consequent ownership of the bed of the Coosaw river, and Mr. Justice Harlan cites with approval *Att'y-Genl.* v. *Jamaica Pond Aqueduct*, 133 Mass. 361–3–4, which sustained the jurisdiction of chancery to enjoin the creation of a nuisance detrimental to the public health by draining a pond, but held also that it might be sustained because the public owned the great ponds of that State.

But it was suggested on argument below that this principle was not the basis of sustaining the jurisdiction, because as the States own in virtue of their sovereignty the beds of navigable waters within their borders, this would exclude, on the

theory of the writer, governmental control over them by the United States. On the contrary, such control is expressly committed to Congress, and in so far as that body acts, it is paramount, and in effect has for the purposes of exercising this power paramount title and the eminent domain.

Stockton, Att'y-Gen., v. *B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9, per Mr. Justice Bradley.

In concluding this brief discussion of the right of the United States to appeal to chancery in aid of public commerce to restrain and control the obstruction of navigable waters, let it be noted that no case has been cited where this has been sustained except for the protection of property rights in the government or in pursuance of express authority of Congress.

It is also necessary to consider the character of the acts enjoined. Can it be successfully maintained that either before or since the River and Harbor Act of 1890, the government could maintain a bill to enjoin a strike of employes on a steamship line or piracy on the high seas, on the ground that because navigation was thus hindered the persons responsible for this were maintaining obstructions in navigable waters? Most certainly not. Such an interference with navigation would be no obstruction of navigable waters under the statute.

Francis v. *Flinn*, *supra*.

V.

But this whole subject is foreign to the question in this case and its importation into the discussion demonstrates the difficulties in which learned counsel for the government find themselves in the effort to maintain their original position. Waterways are not railways. They are free to all comers and are not the subject of private ownership nor control, but only of municipal regulation by public authority.

Lake Front Case, 146 U. S. 387.

The control of the railway is primarily with the company that owns and operates it. These great interests are entirely able to cope with any interference with their property. If they be held, in a high sense as trustees for the public, why

should equity entertain a suit by the beneficiaries of this trust until the trustees have proved recreant? These companies own the land over which their lines run or a right of way in perpetuity, and though charged with public duties, are still private pecuniary corporations operated for gain. As to all local matters, viz., the speed of trains, stopping at crossings, elevation of tracks and things of that character, they are subject to local or State regulation. This could not be were the power of Congress exclusive as in the matter of interstate rates.

Wabash Ry. v. *Illinois*, 118 U. S. 557.

It may be that were Congress to declare that the United States might maintain a bill to enjoin the obstruction of interstate commerce on railroads engaged therein, where such obstruction amounted to what, on a public highway, would be a public nuisance, such legislation would be admissible. No such act has been passed, and the proposition now under discussion is whether in the absence of legislation a suit like this will lie. That it will not, is too plain for argument. That the bill of the government was not framed on any such theory is equally obvious. All the cases cited below by counsel for the government and the Coosaw Mining Co. case, not cited by them but just referred to, show that in such case the proper procedure is by information in equity in the name of the attorney-general. It may be that this bill, which is not brought in the name of the attorney-general nor signed by him, is fatally defective on this point, even under the act of 1890, which does not expressly authorize suit in the name of the government. But that is too narrow a point for this case. What is perfectly plain is that this bill was not framed as a bill to abate or enjoin a public nuisance; for had such been its purpose it would have been in form an information in the name of the attorney-general, which is the familiar procedure at common law.

It may well be doubted, though the jurisdiction of equity at the suit of the law officers of a State has frequently been appealed to where some restraint was sought to be imposed upon great railroad corporations, whether any precedent can be found of a bill by the State to enjoin obstruction of rail-

ways as public highways. None such has been cited for the government; none has been discovered by counsel for the petitioners in this investigation. If such a suit has never been brought, in view of the plenary sovereignty of the State it is a strong argument against the right to maintain such in the name of the nation without distinct congressional authority.

But if such a suit will lie to restrain the obstruction of railways engaged in interstate traffic, it is equally available to enjoin such obstruction of public roads over which interstate commerce is carried on, and in one view at least this embraces every public highway in the country; for there are none that are not traversed more or less frequently by persons in interstate travel, nor over which interstate freight traffic is not carried on. Clark and State streets in Chicago, are highways of what, in this sense, is a vast interstate traffic, and in this sense, as suggested by the court below on argument, the street cars are engaged in such commerce. Can it be possible that in advance of congressional action the government may maintain a bill to restrain the obstruction of any public road anywhere in the United States on this theory? If, so, then such obstruction, though by local municipal or State law valid, must still be investigated to ascertain whether, tested by some uncertain and vague principles as to the law of nuisance or purpresture, it is an interference with interstate commerce under federal law.

If, for instance, an elevated road be constructed in one of the streets of Chicago under proper authority from the State and the city, on this theory, it would still be open to the government to file a bill to have it judicially determined whether or not this was not an interference with, and obstruction to interstate commerce carried on over that street, particularly if a street car line was at that time operated upon it.

It can not be possible that any such supervisory powers over roads and highways and other ways of interstate commerce can be exercised by the general government in advance of explicit and definite congressional legislation. No such police power exists either in the executive or the courts. That it does not, as to navigable waters, has been distinctly

held by this court. It has not been held as to highways or railways, because up to this time no one dreamed that such a power would be asserted or claimed.

But if it existed it could not be exercised against such an obstruction of a public way as is shown here. No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence though occurring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.

The courts should stand aloof from them and not invade executive prerogative, nor even at the behest or request of the executive travel out of the beaten path of well settled judicial authority. A mob can not be suppressed by injunction; nor can its leaders be tried, convicted and sentenced in equity.

It is too great a strain upon the judicial branch of the government to impose this essentially executive and military power upon courts of chancery.

In the case of public nuisance, equity is appealed to in order to secure the abatement of the nuisance. The remedy by indictment is not entirely adequate to this. The right of individuals or public officers to abate it without process of law is also of doubtful efficacy. There is then no adequate remedy except in equity. But to the repression of such violence and public disorder as are alleged in this bill, the remedy in chancery is entirely inadequate; that by physical force, backed by the whole power of the State, or, where Federal authority is defied, the nation is alone efficient to restore order and compel obedience to law. Such an emergency calls for the exercise of executive not judicial power. The latter is invoked, or may be, not to check and repress the manifestations of lawlessness, but to involve in some kind of constructive participation in, or responsibility for it, those not actively concerned or whose connection with it is so remote that ordinary procedure is by those in power distrusted as a means of establishing guilt and securing punishment.

It is precisely here that such innovations threaten civil liberty and excite the apprehensions of those who feel that by

such insidious attempts it is more seriously endangered than by open and undisguised attack. Violence and riot can be suppressed and subdued by military force, but not prevented by injunction. A resort to the latter remedy may furnish a specious pretext for putting alleged ringleaders upon trial, deprived of all rights guaranteed by the Constitution to those accused of crime, and inflicting on them such unlimited punishment as the discretion of the chancellor in the exercise of this dubious jurisdiction may approve. It can do no more except perhaps to bring scandal upon the administration of justice, and weaken that respect for law which in a free state is always the chief security for social order.

Two cases decided by this court are cited in the opinion of the court below as tending to support the position that this bill would lie in the absence of statute.

The first is *Mayor of Georgetown* v. *Canal Co.*, 12 Pet. 91, from which the court quotes as follows:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general. This jurisdiction seems to have been acted on with caution and hesitancy. Thus it is said by the chancellor, in 18 Ves. 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer upon the discussion of the right of the attorney-general, by some species of information, to seek, on the equitable side of the court, relief as to nuisance, and preventive relief. Chancellor Kent, in *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. Ch. 382, remarks that the equity jurisdiction in cases of public nuisances, in the only cases in which it had been exercised (that is, in cases of encroachment on the king's soil), had lain dormant for a century and a half (that is, from Charles I. down to the year 1795). Yet the jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief that can be obtained by law. While, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances where it is exercised are rare, yet it may be

exercised in those cases in which there is eminent danger of irreparable mischief before the tardiness of the law can reach it."

The other is *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518. It is not perceived that the latter case has any bearing on the point in question. In that case the State of Pennsylvania, in virtue of its extensive property rights, was admitted as a suitor in the courts of the United States to protect those rights. It was strictly a case of equitable cognizance, calling for the application of familiar principles of equity.

The extract from the former case is entirely in line with cases already cited and throws no light upon this case at the point of difficulty, except as it illustrates the care with which the chancery proceeds at the instance of the sovereign to deal with a public nuisance and suggests that occasions calling for such interference are rare.

On the question of authority therefore it may be confidently stated that the English chancery has never at the instance of the Crown entertained an application to enjoin obstruction of railways as a public nuisance; that such application has never been entertained, so far as the researches of counsel in this case have extended even to enjoin a mere temporary obstruction of public highways by a riotous mob; that no such suit has been maintained by a State of the American Union or its attorney-general to prevent obstruction of railways within its borders, nor of its public highways by the means alleged in this bill; and that no attempt has ever been made before to sustain such a bill on this theory by the government of the United States or in the name of its attorney-general.

Undoubtedly similar bills brought by suitors and whose property rights have been threatened or invaded by wrongs similar to those alleged in this bill have been entertained and preventive relief in chancery accorded. It may well be asked why such bills were not exhibited by the railroads in this instance to protect their property and business. Although the writer is not familiar with any authority in the English chancery for such procedure, precedents are not wanting in this country to sustain it.

In England, the rugged and liberty-loving spirit of the race does not seem to tolerate these doubtful efforts to maintain the public peace by arbitrary methods, unknown to the common law and contrary to the genius of free institutions. Public disorder is sternly repressed by physical force, but those not concerned in it are not in peril of losing their liberty without trial by jury and in disregard of all the constitutional guaranties of civil liberty.

Some reference is made in the opinion as to the effect of the act to regulate commerce of February 4, 1887, and the act of March 2, 1889, amendatory thereof (p. 743), but as the learned court seems unable to find anything in these acts germane to the discussion, it is not necessary to say more than that there is provided in those acts much new remedial procedure, but nothing like that here attempted.

As the case stands therefore, considered independently of the act of July 2, 1890, there is an absolute want of authority to support it, irrespective of the question that arises from the fact of the dual sovereignty of State and Nation and the further fact that on the subject touched by the bill neither courts nor executive can act in advance of the Congress. Accepting *arguendo* the analogy suggested by counsel for the government between the jurisdiction of the Federal courts in respect of navigable waters and that here claimed, the authority of this court is distinctly against the bill. But as has been already seen no such analogy exists. It is not therefore remarkable that the able and learned judge below having fully surveyed the field traversed in this argument should, although with some apparent reluctance, abandon the effort to sustain the bill on this theory and place it squarely on the act of 1890, so often referred to. To the discussion of the soundness of that position this argument will now proceed.

VI.

The question whether that act is applicable to such matters as are set up in the bill will be discussed here rather incidentally. It is the main purpose of this argument to demonstrate the right of all persons charged with infractions of Federal

law to trial by jury and to show that the position of counsel for the government and the court below involves a denial of this right as to offenses against the act in question. This is the most important question in the case. It is not a technical but a substantial and practical question of the deepest interest and most essential character.

Fletcher of Saltoun records that he "knew a very wise "man that believed that, if a man were permitted to make all "the ballads, he need not care who should make the laws of a "nation." But it has been well observed that a wiser man might justly say he cared not who should make the laws if he might be permitted to administer them.

It in this aspect that the jury is of such great practical importance in the administration of justice. Jurors are called from the people. Not permanent officers of the law, they are thus less accessible to influences which powerful interests would seek to direct against those with whose official conduct they are concerned. They give their verdict "without reasons "and without responsibility."

What they have done is imputed, not to those who govern and restrain the people, but to the people themselves. It may be doubted whether without juries the administration of criminal justice in a free State would not become so odious as to be almost impossible. It can not be doubted that without trial by jury civil liberty could not exist. This does not deny participation of a court nor import that life and liberty are to be disposed at the pleasure of the unlettered panel. Trial by jury is trial by court and jury; the court to decide the law, the jury the facts.

Sparf v. *U. S.*, in this court.

Erskine, who, perhaps, did more than any one man in behalf of this institution once said in Parliament: "For trial by "jury I have fought in the hottest times and shall ever fight, "but I do not imply anything in favor of the jury separate "from the judge who presides at the trial; it is the trial of "judge and jury which attracts my respect and admiration, "and I do not stand up for the jury more than for the judge."

A single judge, however wise and impartial, ought not to

be intrusted with absolute power over the life and liberty of the citizen.

Blackstone observes:

"But in settling and adjusting a question of fact, when in-
"trusted to any single magistrate, partiality and injustice have
"an ample field to range in; either by boldly asserting that to
"be proved which is not so, or by artfully suppressing some
"circumstances, stretching and warping others, and distin-
"guishing away the remainder."

3 Bl. Com. 380.

Such partiality is sometimes entirely consistent with an honest belief in the mind of a magistrate as to his entire fairness and impartiality. But in any case the personal bias, prejudice and environment of the judge are involved; with twelve men in-instead of one, this element is reduced to a minimum. The important relation of this institution to popular sovereignty did not escape a critical European observer of American government.

De Tocqueville says: "The true sanction of political
"laws is to be found in penal legislation, and if that sanction
"be wanting the law will sooner or later lose its cogency.
"He who punishes infractions of the law is therefore the real
"master of society. Now, the institution of the jury conse-
"quently invests the people or that class of citizens with the
"direction of society."

1 Dem. 263-4.

And again:

"The jury is pre-eminently a political institution; it must
"be regarded as one form of the sovereignty of the people;
"when that sovereignty is repudiated, it must be rejected, or
"it must be adapted to the laws by which that sovereignty is
"established."

Ib., 265.

By Alexander Hamilton it was regarded as a part of the administration of criminal law essential to civil liberty.

In the eighty-third number of the Federalist, arguing in

favor of leaving Congress free to provide for trial by jury in civil cases as might be deemed proper, he says:

"But I must acknowledge that I can not readily discern "the inseparable connection between the existence of liberty, "and the trial by jury in civil cases. Arbitrary impeach- "ments, arbitrary methods of prosecuting pretended offenses, "arbitrary punishments upon arbitrary convictions, have ever "appeared to me the great engines of judicial despotism, "and all these have relation to criminal proceedings. The "trial by jury in criminal cases aided by the *habeas corpus* "act, seems therefore to be alone concerned in the question."

Many years ago in an argument before the Supreme Court of Wisconsin, of which he was afterward an associate justice, Byron Paine, then a young man of twenty-seven, pronounced a eulogy upon trial by jury which in felicity of expression and lofty eloquence, has scarcely been surpassed in the literature of jurisprudence. Arguing that the fugitive slave law was unconstitutional in that it deprived the alleged fugitive of a jury trial upon the question of his right to liberty he said:

"As the ark of the covenant containing the testimonies of "God was borne by the twelve chosen tribes of Israel from the "wilderness onward to the land of promise, and as the waters "divided before it and allowed the people to pass through "dry shod; so has the trial by jury, the ark of the covenant "containing the testimonies of liberty been borne by the "twelve onward from remote ages of barbarism to the present "advanced state of civilization, and so during all that toilsome "march the waves of tyranny have divided before it and al- "lowed the people to pass through unscathed."

It is not intended to attempt any vindication of the constitutional guaranties which secure this right to American freemen nor to seek to justify popular confidence in this method of trial.

Yet a brief extract from the argument of Mr. Black, in the Milligan case, as it is found reported with the decisions of this court, may not be inappropriate.

In the course of that argument he said:

"We do not assert that the jury trial is an infallible mode

"of ascertaining truth. Like everything human, it has its "imperfections. We only say that it is the best protection "for innocence, and the surest mode of punishing guilt, that "has yet been discovered. It has borne the test of a longer "experience, and borne it better than any legal institution "that ever existed among men. England owes more of her "freedom, her grandeur and her prosperity to that than to "all other causes put together. It has had the approbation "not only of those who lived under it, but of great thinkers, "who looked at it calmly from a distance and judged it impar- "tially; Montesquieu and De Tocqueville speak of it with an "admiration as rapturous as Coke and Blackstone."

4 Wall. 65.

The opinion in this most important case responds strongly to the virile and eloquent appeal for Anglo-Saxon institutions made by the great lawyers who represented the petitioners, a wonderful triumvirate, Field, Black and Garfield. Mr. Justice Davis writing for the court, after referring to the constitutional provisions securing trial by jury, said:

"These securities for personal liberty thus embodied, were "such as wisdom and experience had demonstrated to be nec- "essary for the protection of those accused of crime. And "so strong was the sense of the country of their importance "and so jealous were the people that these rights, highly "prized, might be denied them by implication, that when the "original constitution was proposed for adoption it encoun- "tered severe opposition; and but for the belief that it would "be so amended as to embrace them, it would never have "been ratified.

"Time has proven the discernment of our ancestors; for "even these provisions, expressed in such plain English words "that it would seem the ingenuity of man could not evade "them, are *now*, after the lapse of more than seventy years, "sought to be avoided. Those great and good men foresaw "that troublous times would arise, when rulers and people "would become restive under restraint, and seek by sharp and "decisive measures to accomplish ends deemed just and proper; "and that the principles of constitutional liberty would be in

"peril, unless established by irrepealable law. The history of "the world had taught them that what had been done in the "past might be attempted in the future." (P. 120.)

After indicating that persons in the military and naval service were amenable to the jurisdiction which congress had created for their government, he says:

"*All other persons*, citizens of States where the courts are "open, if charged with crime, are guaranteed the inestimable "privilege of trial by jury. This privilege is a vital principle, "underlying the whole administration of criminal justice; it "is not held by sufferance, and can not be frittered away on "any plea of state or political necessity. When peace pre- "vails and the authority of the government is undisputed, "there is no difficulty of preserving the safeguards of liberty; "for the ordinary modes of trial are never neglected, and no "one wishes it otherwise; but if society is disturbed by civil "commotion, if the passions of men are aroused and the "restraints of law weakened, if not disregarded these safe- "guards need, and should receive, the watchful care of those "intrusted with the guardianship of the constitution and "laws. In no other way can we transmit to posterity, unim- "paired, the blessings of liberty, consecrated by the sacrifices "of the revolution." (P. 123–4.)

That case was decided nearly thirty years ago; and in the interval and until this case, no serious attack has been made on the right to jury trial, under the constitution of our country. The present assault is more dangerous, because more covert and insidious; more serious because occasion for invoking it as a precedent will be more frequent; less excusable in that it comes in time of peace and not as the result of a natural and loyal impulse in an earnest and aggravated people by strong and stern measures to punish treason and secret plottings against the nation's life; but rather at the instance of corporate and aggregated wealth in the cold and sordid spirit which would sacrifice constitutional liberty upon the altar of net earnings and exalt the interests of stockholders above the rights of man.

The act of July 2, 1890, is as follows:

"AN ACT to protect trade and commerce against unlawful restraints and monopolies.

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute

proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (26 Stat. 209, c. 647.)

It is not intended here to elaborate the argument that this act is wholly inapplicable to matters such as are set out in this bill, but merely to say that sections 1 and 6 being construed together, it is apparent that the statute is aimed at monopoly of trade or commerce by which trade should be engrossed, and in and by which property should be employed and secured. But that even should this contention be denied, still the statute does not confer a right on the government to proceed under the direction of the attorney-general to abate a public nuisance existing in a highway of interstate commerce, but generally by section 4, to prevent and restrain, by injunction, violations of a penal statute. It is thought, therefore, as held by Judge Putnam in

United States v. *Patterson*, 55 Fed. R. 605,

that this act is inapplicable; but if it is, then it is unconstitutional as an attempt to enforce a penal statute in equity; and not a justifiable authority for a proceeding familiar to equity, and under congressional authority, admissible in the Federal courts in the name of the government.

The cases holding to the contrary of the case just cited are collected in the opinion of the court below. They are certainly respectable in number and worthy of consideration; and undoubtedly the opinion of the court below merits and will receive on this and on other points the most careful attention. Indeed it may be doubted whether it is materially strengthened by the decisions referred to announcing the same result, and it may be accepted as the ablest exposition possible of the views combatted in this argument. But that result is so startling and so far from what was in the legislative mind that those who defend it must certainly take the laboring oar. It is difficult to believe that by this act Congress intended to entirely supplant the police power of the States over railways and other highways of interstate commerce when the subject is not mentioned in the act; nor to charge the courts of the United States with a general supervisory power over strikes which may more or less remotely affect commerce between the States or between this and other nations, though this subject is not mentioned in the bill. When in the New Orleans

case (54 Fed. Rep. 994), the law was applied to draymen in that city, but one more extravagant appeal to judicial authority under its provisions seems possible; and that would be for the learned attorney-general to appear in the court below and seek to enjoin at the suit of the government, a strike among the elevator boys at the Palmer House in order to prevent undue interference with the considerable interstate commerce carried on, in part at least, in the elevators of that hotel.

But proceeding to the constitutional question involved some notice may be taken of an argument often made in favor of the law and asserted by Judge Phillips in overruling a demurrer to a similar bill at St. Louis.

U. S. v *Elliott*, 64 Fed. R. 27.

The learned judge expressed his inability to perceive why the same power that punished could not prevent. If this be sound, then as Congress may provide for the punishment of all crimes against the United States, it may equally provide that they be "prevented," *i. e.*, enjoined in equity, and at one stroke of the pen the administration of the criminal code of the United States would be transferred to the chancery and all constitutional guaranties as to proceedings to punish crime would be obliterated. Lest it seem incredible that an experienced Federal judge would seek to maintain so untenable a position, his exact language is given as follows:

"I am unable to perceive the force of the argument against "the power of Congress to authorize such civil proceedings in "equity to suppress and restrain combinations and conspira- "cies to accomplish the obstruction and destruction of inter- "state commerce and trade before it is accomplished. It was "just as competent for Congress to provide this civil remedy "of prevention as it was to provide for punishment in a crimi- "nal proceeding for the unlawful conspiracy entered upon or "consummated."

Ib., 31.

Now it is quite obvious that an injunction granted against the violation of a penal statute does not prevent, except as it prohibits that which has already been forbidden by law. The

judicial edict adds nothing to the legislative mandate already declared. The declaration of a court as the organ of the law that the action enjoined is unlawful and prohibited, adds nothing.

But if the sovereign can maintain a bill to restrain conduct merely because it is unlawful, and then punish for contempt those violating the injunction, all the essential principles of chancery and all the safeguards of constitutional liberty are set at naught and disregarded.

Sec. 4 of the act distinctly provides for proceedings in equity to prevent and restrain violations thereof; nothing could be plainer than its language. It also provides for injunction and temporary restraining order against violations of its provisions. There is here no room for construction. The language and purpose of the section are clear and plain.

In some quarters the idea that by drastic legislation and severe and arbitrary procedure morality and public order can best be promoted and preserved and vice and crime rendered impossible finds no little favor.

To such publicists the criticism of a once eminent member of the Chicago bar upon the reforming enthusiasm of one of his associates may be commended. He remarked that "Brother B—— would codify all law in an act in two "sections:

"1. All people must be good.

"2. Courts of equity are hereby given full power and "authority to enforce the provisions of this act."

If it lay within the power of chancery to really prevent violations of law, and to abolish crime certainly it would require much hardihood to argue on technical grounds against the propriety of exercising a jurisdiction so benign.

Then, indeed, by one grand bill of peace, brought under the direction of the learned attorney-general, vice, crime and wickedness might be banished from the earth and the millennium at once inaugurated by any circuit judge of the United States sitting in chancery.

There is one authority highly favorable to such a view which seems to have been overlooked. It is noted by the late

Lord Justice James in his well known epigram upon Lord Westbury:

"He was an energetic and successful statesman, and during "the three years over which his tenure of office extended, he "abolished the time-honored institution of the courts of in- "solvency, the ancient system of conveying land and the eter- "nity of punishment. So lately as on Tuesday last, by a judi- "cial decision of the Privy Council, he abolished hell, with "costs, and took away from the orthodox church party in "England their last hopes of everlasting damnation." 98 L. L. T., 302.

Scarcely less ambitious was the effort of the learned attorney-general in this case.

This writ was issued against certain defendants and all other persons. It was attempted to be served on a mob. This was as wide a departure from received ideas as to the office of a writ of injunction as it is possible to conceive.

It issues to prevent threatened injury to property rights. It prevents only as it prohibits; but in civil cases this means much because after the writ issues what was before a mere violation of civil or contract right subjecting a party to an action for damages after the writ becomes a contempt of court and punishable criminally as such. Therefore, the essential object of an injunction is by threat of such consequence to deter, in appropriate cases, violation of property rights. If that were the object in this case, and no other can be perceived, here was simply an effort to transfer the prosecution for offenses against this act to the courts of the United States sitting in chancery and thus to evade the constitutional guaranties secured to persons charged with crime.

In substance, the court below was sitting to try the defendants on a criminal charge of violation of the act in question. The opinion of the court illustrates this.

Thus at page 764 is found a collection of authorities in criminal law on the question of criminal conspiracy remarkable as part of a judgment by a chancellor; and at page 765 this language is employed:

"The evidence leaves no feature of the case in doubt. The

"substance of it, briefly stated, is that the defendants, in com-
"bination with the members of the American Railway Union
"and others, who were prevailed upon to co-operate, were
"engaged in a conspiracy in restraint or hindrance of inter-
"state commerce over the railroads entering Chicago, and, in
"furtherance of their design those actively engaged in the
"strike were using threats, violence, and other unlawful
"means of interference with the operations of the roads; that
"by the injunction they were commanded to desist, but, in-
"instead of respecting the order, they persisted in their pur-
"pose, without essential change of conduct, until compelled
"to yield to superior force."

When it is remembered that upon such facts an injunction was issued at the suit of the sovereign power in a case brought solely for an injunction it may safely be said that this case is not only absolutely without precedent or parallel but entirely foreign to the jurisdiction of equity and at war with the settled principles upon which courts of chancery have always proceeded. It is not necessary to commit a free and independent people to the wardship of the chancellor.

But the learned judge below remarks that the same act may be a crime and a contempt of court, as a criminal offense like murder committed in the presence of the court. This is true, because the act itself being committed *in facie curiæ* has ever been recognized as a contempt. But it is equally true as has been often decided that the legislature can not declare crimes which are not contempts to be such and thus destroy the constitutional rights of those charged with crime. That is precisely what is attempted by the construction of section 4, of this act, adopted by the court below. On this theory train wrecking on interstate roads may be enjoined and its perpetrators tried and sentenced for contempt.

The suppression of public disorder and tumult is an executive and not a judicial function. It can be successfully dealt with only by physical force. Those concerned in it merit punishment and in this the duty of the courts is plain. But it is equally plain that the only object of a suit by the government for injunction to prohibit what the criminal code has

already forbidden is to change the procedure by which the guilt of those charged is to be ascertained and their punishment inflicted. What other possible object can be plausibly suggested?

It matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual and must be so declared by the courts; and to this court, more than to any other the American people, mindful of its historic and consistent fidelity to the principles of constitutional liberty look for the vindication and preservation of these essential rights.

In the case of *Boyd* v. *United States*, 116 U. S. 609, Mr. Justice Bradley said upon a similar question:

"If an indictment had been presented against the claimants "upon conviction the forfeiture of the goods could have been "included in the judgment. If the government prosecutor "elects to waive an indictment, and to file a civil information "against the claimants, that is, civil in form, can he by this "device take from the proceeding its criminal aspect and de-"prive the claimants of their immunities as citizens, and extort "from them a production of their private papers, or, as an "alternative, a confession of guilt? This can not be. The in "formation, though technically a civil proceeding, is in sub-"stance and effect a criminal one," p. 634.

No elaborate and exhaustive review of the authorities on this subject will be attempted. None can be found to sustain the position of the government, at least in any jurisdiction where the common law prevails. Some cases may be briefly noted.

Any attempt to evade the constitutional guaranty of trial by jury is nugatory and void.

Puterbaugh v. *Smith*, 121 Ill. 199.

In that case a statute providing that a person in Illinois refusing to give his testimony before a proper officer, to be used in another jurisdiction, might be compelled to do so by the Circuit Court of his county and that failure to obey its order should be contempt, was held to be unconstitutional. The court held that the legislature could not declare crimes contempts, and deprive the accused of trial by jury.

The liquor law of Massachusetts was, by a divided court, held valid, one provision being that a place where liquor was sold might be abated by proceedings in equity as a nuisance. But this was placed distinctly on the ground that it was not an attempt to enforce the criminal law in equity, but a proceeding to enjoin the use of certain property in such a way as to constitute a nuisance.

Carleton v. *Rugg*, 149 Mass. 550–7.
Also, *Littleton* v. *Fritz*, 65 Ia. 488.

As trial by jury is not essential, at least in civil cases, to due process of law within the meaning of the fourteenth amendment,

Pearson v. *Yewdall*, 95 U. S. 244,

a similar liquor law in Iowa was held not contrary to that amendment, and the sixth and seventh amendments being inapplicable to State legislation, the law was not deemed inconsistent with the Federal constitution.

Eilenbecker v. *Plymouth Co.*, 134 U. S. 31.

In *Scott* v. *Neely*, 140 U. S. 106, an attempt was made to sustain a bill in chancery in the nature of a creditor's bill on a debt not reduced to judgment under a statute of the State of Mississippi. Mr. Justice Field in a luminous and convincing opinion, reviewed the decisions of this court and held that such a statute, in so far as it was invoked in aid of the jurisdiction of a Federal court, was contrary to the seventh amendment to the constitution and void.

This case was followed and its principles applied to a case brought originally in a State court and removed to a Federal Circuit Court.

Cates v. *Allen*, 149 U. S. 451.

Many similar cases may be found in the State courts.

Flint River etc., Co. v. *Roberts*, 2 Fla. 102.
North Penn. Coal Co. v. *Snowden*, 42 Pa. St. 488.
Haynes' Appeal, 73 Pa. St. 169.
Love v. *Morrill*, 19 Or. 545.
Collins v. *State*, 88 Ala. 212.

People v. *Hoard*, 10 Lawy. Rep. Am. 831 (Sup. Ct. of Idaho.)

It may seem that this proceeding involves but a slight departure from constitutional methods and ought out of deference to the legislative department to be sustained. This is not true. It involves denial of a right of the highest value to the citizen; it breaks down the most important bulwark of civil liberty.

Blackstone well says, book 3, p. 381:

"It is, therefore, upon the whole, a duty which every man "owes to his country, his friends, his posterity and to him- "self, to maintain, to the utmost of his power, this valuable "institution in all its rights * * * to guard with the "most zealous circumspection against the introduction of new "and arbitrary methods of trial, which, under a variety of "plausible pretenses, may in time imperceptibly undermine "this best preservative of English liberty."

In *Boyd* v. *United States*, *supra*, Mr. Justice Bradley said, p. 635:

"It may be that it is the obnoxious thing in its mildest and "least repulsive form; but illegitimate and unconstitutional "practices get their first footing in that way, namely, by silent "approaches and slight deviations from legal modes of proce- "dure. This can only be obviated by adhering to the rule "that constitutional provisions for the security of person and "property should be liberally construed. A close and literal "construction deprives them of half their efficacy, and leads "to gradual depreciation of the right, as if it consisted more "in sound than in substance. It is the duty of courts to be "watchful for the constitutional rights of the citizen, against "any stealthy encroachments thereon. Their motto should "be *obsta principiis*. We have no doubt that the legislative "body is actuated by the same motives; but the vast accumu- "lation of public business brought before it sometimes prevents "it, on a first presentation, from noticing objections which be- "come developed by time and the practical application of the "objectionable law."

This language is quoted with approval in

Counselman v. *Hitchcock*, 142 U. S. 547-582,

Mr. Justice Blatchford speaking for the court.

But it is sought to evade these principles and authorities by saying that section 4 of the act should be construed as committing to the Federal courts jurisdiction over the ways of interstate commerce at the suit of the government to prevent and abate such obstructions thereof as amount to a public nuisance; and it is said such jurisdiction existed in the English chancery upon information by the attorney-general. This is a most astounding discovery. No one reading the act would suppose it had the slightest reference to such a subject. It provides plainly and explicitly for proceedings in equity "to prevent and restrain violations" of its provisions.

To say that by this act Congress intended to make such a radical redistribution of the police power between the States and the Nation as is involved in this suggestion, is a remarkable proposition. Allusion has been briefly made to some of the far-reaching effects of such a change. It would be reasonable to assume that had it been intended to accomplish this, some language which by fair construction could be held to import such a legislative purpose, would have been found in the act. None such has been pointed out. The act has, through exposition of the courts, failed entirely in reaching the evils at which it was obviously and indubitably aimed. It has been declared to be available, not against the enormous and powerful combinations at which it was directed, but only against some of the poor and helpless victims of these combinations. Draymen, switchmen, brakemen, railway engineers and firemen, were, it seems, in legislative contemplation when this act was framed; not trusts, combinations of capital, railway traffic associations or other monopolies; and now, when it is demonstrated that such a construction invalidates one of the effective sections of the act, the last refuge is to import an entirely new provision into it, and say it is directed against the maintenance of an obstruction in the ways of interstate commerce amounting to a public nuisance. With all deference,

this is a proposition so preposterous as not to merit serious consideration.

But suppose the statute be thus reconstructed on the model of section 10 of the River and Harbor Act of 1890, already referred to. Section 4 will in part then read thus:

"That the creation of any obstruction not affirmatively "authorized by law in or upon the tracks or right of way of "any railway engaged in interstate commerce, or upon any "other ways of interstate commerce, is hereby prohibited * "* * the creating, or continuing of any unlawful obstruc- "tion in this act mentioned may be prevented, and such ob- "struction may be caused to be removed by the injunction of "any Circuit Court exercising jurisdiction in any district in "which such obstruction may be threatened or may exist; and "proper proceedings in equity to this end may be instituted "under the direction of the attorney-general of the United "States."

Can it be plausibly contended that under this statute, thus reconstructed, men could be enjoined from threatening and intimidating other men and preventing them from working on railway trains, coaches or drays, passing over these ways of interstate commerce, and for violation of such an injunction, punished for contempt? Most certainly not.

In a recent case in the Court of Criminal Appeals, in Texas, it was held that threats against a road officer to prevent him from removing a fence obstructing a road do not constitute the offense of obstructing a road.

Chaffin v. *State*, 24 S. W., 411.

To recur to the information, it is to be noted that the petitioners are not charged with anything but ordering, advising and controlling a strike. It is not possible that such conduct could be held to be in violation of an injunction issued under a statute like that just supposed. But no such statute exists. It is purely imaginary. It does not require construction; it can not be tested as to constitutionality. It simply is not. The act under consideration was in fact never intended to have application to such matters as are set out in the bill. It does not relieve the case of its difficulties to say that an act might

have been passed which would be constitutional and applicable.

No such act has been adopted. If it had it would not warrant any such injunction as was issued in this case. Did any one ever suppose that if a man threatened to molest the driver of a stage coach, he could, at the instance of the attorney-general, be enjoined in the high court of chancery of England on the ground that he was threatening a public nuisance or maintaining one by obstructing the highway over which the coach was driven? Could Robin Hood or Dick Turpin and their fellow knights of the road be enjoined from maintaining a public nuisance in obstructing the highway because they robbed those passing along upon it?

The case submitted is one of gravity. It touches the rights of those who seldom seek audience in this tribunal. It goes further; it touches nearly and closely the institution by which more than by any other, civil liberty is preserved and the rights of the citizen to life and to liberty assured and protected. The interests of property in this case directly involved are, possibly, small and inconsiderable; yet probably no case has ever been presented to this court in the result of which so many persons within its extensive jurisdiction feel a deep and vital personal interest.

These petitioners have been struck at because they represent a cause.

The ordinary methods of punishment do not seem to have been regarded as adequate. It is ever so in cases of constructive crime where power seeks to strike down those who have not clearly transgressed positive law. Constructive treason has added innumerable instances to the long calendar of executive and judicial crimes and oppressions. When the law is respected, when constitutional safeguards are maintained, though crime may sometimes escape punishment, at least innocence is secure.

But no more tyrannous and arbitrary government can be devised than the administration of criminal law by a single judge by means of injunction and proceedings in contempt. To extend this power generally to criminal cases would be ab-

solutely destructive to liberty and intolerable to a free people. It would be worse than *ex post facto* legislation. No man would be safe; no limits could be prescribed to the acts which might be forbidden nor the punishment to be inflicted. The only way to prevent the possibility of such conditions is sternly to resist the beginnings of evil. The legislative department can not justly be charged in this instance with the construction which the courts have fastened upon this law. The responsibility for that rests with those judges who have thus interpreted the law to increase their power. It is time for this court to arrest these tendencies; to point out clearly the ancient landmarks, and to secure, by a free exercise of corrective power, the restoration of constitutional methods and the preservation of constitutional liberty.

Respectfully submitted,

S. S. Gregory,
Counsel for Petitioners.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

EXPARTE.) No. 11.
EUGENE V. DEBS ET AL.) ORIGINAL.
Habeas Corpus.

BRIEF BY LYMAN TRUMBULL.

OF COUNSEL FOR PETITIONER.

BARNARD & MILLER, PRINTERS.

SUPREME COURT OF THE UNITED STATE.

OCTOBER TERM, A. D. 1894.

EXPARTE, EUGENE V. DEBS ET AL. | No. 11. ORIGINAL. *Habeas Corpus.*

BRIEF BY LYMAN TRUMBULL.

OF COUNSEL FOR PETITIONER.

The extraordinary proceeding under which the prisoners were deprived of liberty, was commenced by the filing of a bill in equity in the name of the United States, by a district attorney, under the direction of the Attorney General. The bill is unsigned by any one, and has attached to it an affidavit of George Q. Allen, an unknown person, having no connection, so far as the record shows, with the case, stating that he has read the bill, and "believes the statements therein contained are true." The bill was filed July 2d. The same day an injunction was issued, without notice to anybody, against the prisoners and unknown persons, and the next day was served on some of the prisoners. The bill states that twenty-two railroads and railroad companies, and among them the Union Stock Yard and Transit Company, were chartered and organized for the purpose

of continuously doing the business of common carriers of passengers and freight generally, and were doing such business among different states. So far from having such power as alleged, the Union Stock Yard and Transit Company, one of the roads named, was organized for the purpose of locating and conducting stock yards and connecting them by rail with railroads entering Chicago on the south side, and transporting between said cattle yards, "cattle and live stock and persons accom-"panying the same," and by the 11th section of its charter it is declared: "Nothing in this act contained shall be taken or construed as conferring upon the company hereby created any power or authority to maintain or operate a railroad for the conveyance of passengers or freight within the city of Chicago." (2 Private laws of 1865, 678. The charter is declared a public act.)

A large part of the bill is devoted to a statement of the amount of business done at the Union Stock Yards, the quitting of work by the employes of the Company, the handling of live stock and its conversion into food, etc.

The bill states that the prisoners are officers and members of an organization known as the American Railway Union; that in May, 1894, a dispute arose between the Pullman Palace Car Company and its employees which resulted in the employees leaving the service of the company; that the prisoners, officers of the American Railway Union combining together, and with others unknown, "with the purpose to compel an adjustment of the said "difference and dispute between said Pullman Co. and "its employees, caused it to be given out through the "newspapers of Chicago, generally, that the American "Railway Union would at once create a boycott against "the cars manufactured by said Pullman Palace Co.

"and that in order to make said boycott effective, the "members of the American Railway Union who were "some of them employed as trainmen or switchmen, or "otherwise, in the service of the railroads mentioned, "which railroads or some of them are accustomed to "haul the sleeping cars manufactured by the Pullman "Palace Car Co., would be directed to refuse to per- "form their usual duties for said railroad companies and "receivers in case said railroad companies thereafter at "tempted to haul Pullman sleeping cars."

Such is the gist of the bill. All that is subsequently alleged as to what was done by the prisoners, was for the purpose of compelling an adjustment of the difference between the Pullman Company and its employes. To accomplish this, the American Railway Union called upon its members to quit work for the companies which had persisted in hauling the Pullman cars. Was there anything unlawful in this? If not, then the prisoners and the members of the American Railway Union were engaged in no unlawful combination or conspiracy. The allegation that the prisoners, officers and directors of the American Railway Union, did issue and promulgate certain orders and requests to the members of the union in the service of certain railway companies in pursuance of said unlawful purpose, or conspiracy did not make the purpose unlawful, when the facts stated in the bill show that the purpose was not unlawful. All that the prisoners are charged with threatening to do, or having done, was for the purpose, primarily of bringing about an adjustment of the differences between the Pullman Company and its employes. It is only incidentally in pursuit of this lawful purpose that prisoners are charged with obstructing commerce.

The boycott of the Pullman sleepers was, as the bill shows, not to obstruct commerce, but for an entirely different purpose.

It was not unlawful for the American Railway Union to call off the members of the organization, although it might incidentally affect the operation of the railroads. Refusing to work for a railroad company is no crime, and though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act, and not done for that purpose, is no offense.

II.

In the proceeding now before the court the main question is whether the bill states a case over which a court of equity has jurisdiction; if not, then the injunction was void and the prisoners are entitled to their discharge.

This court has often said that equity jurisdiction of the Federal courts is such as was exercised by the high court of Chancery of England at the time of the adoption of the Constitution, or has been conferred upon them by Congress.

Mills v. *Cohn*, 150 U. S., 202.

This is not a bill by the owner of property to prevent an irreparable injury. The government does not own the railroads. It is a bill by the government to prevent interference with the private property of the citizen, lest such interference restrain commerce among the states.

It was said by this court, (Licenses, tax cases, 5 Wall, 470.) alluding to the internal commerce or domestic trade of the states: "Over this commerce Congress has "no power of regulation, nor any direct control. This "power belongs exclusively to the states. No interfer-

" ence by Congress with the business of citizens trans-
" acted within a state is warranted by the constitution,
" except such as is strictly incidental to the exercise of
" powers clearly granted to the legislature."

The Chancery court of England entertained no such jurisdiction when the Constitution was adopted.

If the prisoners were guilty of an offense against the United States by any acts which interfered with the transportation of the mails, the laws provide for their punishment; but equity has no jurisdiction to grant an injunction to stay proceedings in a criminal matter. " If " they did," said Chief Justice HOLT, " the court of " Queen's Bench would break it, and protect any that " would proceed in contempt of it." Accordingly, in the case of *Lord Montague* v. *Dudman*, Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to compel the lord of a manor to hold a court. "The court," he said, " has no jurisdiction to grant an injunction to stay pro-
" ceedings on a mandamus, or on an indictment, or an
" information, or a writ of prohibition."

3d Perkins' Daniel's Ch. Pr., 1721.

III.

It is not in the power of Congress to confer upon a court of equity jurisdiction unless of an equitable nature, which jurisdiction over crimes is not. The Constitution recognizes and confers upon the judicial department jurisdiction in certain cases in law and equity, and provides that trial of all crimes, except in cases of impeachment shall be by jury, and in common law cases ~~presumes~~ preserves the right of trial by jury. It is not competent for Congress to

break down this distinction between law and equity by conferring upon courts of equity, jurisdiction of criminal and common law cases and thereby deny parties the right to a jury trial.

The act to protect trade and commerce against unlawful restraints and monopolies does not apply to the case stated in the bill. If it does, then it is unconstitutional. If a court of equity is authorized to restrain and prevent persons from the commission of crimes or misdemeanors prohibited by law, it must have the power to enforce its restraining order. In this case some of the parties are sentenced to imprisonment for six months, and for what? For doing some of the things forbidden by a criminal statute. If they have done none of the things forbidden, they have not violated the injunction, for it could only restrain them from doing what the law forbade. It follows that by indirection a court of equity under its assumed jurisdiction to issue injunctions and punish for contempts, is made to execute a criminal statute and deprive persons of their liberty without a jury trial. This a court of equity has no power to do, nor is it competent for Congress to confer such a power on a court of equity.

IV.

The injunction issued in this case without notice was absolutely void. No person can be deprived of life, liberty or property, except by due process of law, and to issue an injunction affecting his liberty, without notice, is not due process of law. As was said by this court in *Windsor* v. *McVeagh*, 93 U. S., 277:

"A sentence of a court pronounced against a party with-
"out hearing him or giving him an opportunity to be

" heard, is not a judicial determination of his rights, and " is not entitled to respect in any other tribunal."

The statutes of the United States require notice before an injunction can lawfully issue. Revised Statutes, Sec. 638, declares that: " Any judge of a Circuit court " may, *upon reasonable notice to the parties*, make and " direct and award, at chambers or in the clerk's office, " and in vacation as well as in term, all such process, " commissions, orders, rules, and other proceedings, " whenever the same are not grantable, of course, ac- " cording to the rules and practice of the court."

Section 718 reads as follows: " Whenever *notice* is " given of a motion for an injunction out of the Circuit " or District court, the judge thereof may, if there ap- " pears to be danger of irreparable injury from delay, " grant an order restraining the act sought to be enjoined " until the decision upon the nation."

Section 4 of the act to protect trade and commerce against unlawful restraints and monopolies, provides: " That when the parties complained of *shall have been* " *duly notified of such petition*, the court shall proceed " as soon as may be to a hearing and determination of " the case; and pending such petition and before final " decree, the court may at any time make such tem- " porary restraining order or prohibition as shall be " deemed just in the premises."

These provisions of the acts of Congress clearly imply that no injunction or restraining order shall issue until after notice to the parties.

In this case an injunction, absolute in terms and perpetual, not a restraining order, was issued in contravention of the provision which only authorized a temporary

restraining order even after notice, before a final hearing of the case.

It will be observed that a distinction is made between a temporary restraining order and a writ of injunction, and the latter never issues until after notice and an opportunity to be heard.

The act of Congress, revised statutes, sec. 725, limits the power of federal courts to punish for contempts in disobeying their writs or orders to such as are *lawful*.

The injunction in this case was unlawfully issued without notice, and the prisoners were at liberty to disregard it.

L. & P. TRUMBULL,

Of Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, A. D. 1894.

EX PARTE
EUGENE V. DEBS et al. } *Habeas Corpus.*

No. 11.
Original.

BRIEF AND ARGUMENT FOR PETITIONERS.

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GEO. HORNSTEIN & CO., PRINTERS, CHICAGO.

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ARGUMENT FOR PETITIONERS.

The petitioners, Eugene V. Debs, George W. Howard, L. W. Rogers, Sylvester Keliher, William E. Burns, Roy Goodwin, Martin J. Elliott and James Hogan, are the president, vice-president, secretary, and board of directors, of the American Railway Union, an organization of railway employes engaged in all branches of the railway service and extending throughout the various railway centers of the United States.

On July 2, 1894, an injunction was issued by William A. Woods and P. S. Grosscup, Judges respectively of the Circuit and District courts of the Northern District of Illinois, which injunction was directed against these petitioners and meant to enjoin and restrain them from certain acts and conduct in connection with the general strike which was called and carried on under the author-

ity and direction of said American Railway Union. This injunction was published in the daily papers, in Chicago, Illinois, on the 3d day of July, 1894, and first served upon some of these defendants on the 4th day of July, 1894.

On the 17th day of July, 1894, an information was filed against Debs, Howard, Rogers, and Keliher, by Thomas E. Milchrist, signing himself as an attorney for the United States of America, and which information alleges various acts, especially the sending of certain telegrams therein set out, and declares that the acts alleged and the sending of these telegrams constituted a contempt of court. On August 1st, another information called a supplemental information was filed against petitioners Hogan, Burns, Goodwin and Elliott, and also one J. F. McVean. This information is substantially like the first.

Upon the hearing of this case before William A. Woods, United States Circuit Judge for the Northern District of Illinois, said Judge Woods adjudged these petitioners to be in contempt of court, and sentenced said Eugene V. Debs to six months imprisonment in the County jail at Woodstock, Illinois, and said other defendants to three months imprisonment in the County jail at Woodstock, Illinois. These petitioners presented their petition to this court, praying to be released from said custody on the ground that the court had no authority or jurisdiction to make said order; that the acts complained of in the information were not illegal, or such as to give the court any jurisdiction in the premises.

In this brief it is proposed to discuss only two questions in connection with this case.

First, is the law of 1890, known as the "Anti-Trust "Law," or the Sherman act, applicable to this case?

Secondly, may workingmen lawfully organize and engage in a strike to redress real or fancied grievances, and are any of the acts charged in this information unlawful, or such acts as the court would have the right to enjoin, even assuming that a court had jurisdiction of the case? And incidental to this last question we submit the sufficiency of the verification of the information and the supplemental information.

I.

The Anti-Trust Law Not Applicable to This Case.

In the case of *The United States* v. *Egner*, 62 Fed. Rep., 824, Judge Baker of the District court uses the following language:

"Prior to the second day of July, 1890, it was entirely clear that the United States, as a municipal corporation, had no power either by petition or bill, to go into the courts of equity of the United States, and invoke the aid of those courts by their restraining power to prevent interference with the carriage of the mails, or with the carriage of inter-state commerce. Prior to that time the sole remedy was on the criminal side of the court. The sole method in which the United States as a government could prosecute violators of the interfering with the carriage of mails, or interfering with the instrumentalities used in the conduct of inter-state commerce, was by indictment or information on the criminal side of the court."

The anti-trust law, passed July 2, 1890, is entitled, "An Act to protect commerce against unlawful acts," and reads as follows:

Section 1. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade,

or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. (Extends the provisions of Section 1 to the territories, and the District of Columbia.)

SEC. 4. The several Circuit courts of the United States are hereby invested with the jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations.

Such proceedings may be by way of petition, setting forth the case, and praying that such violation shall be enjoined, or otherwise prohibited.

When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under Section 4 of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas

to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in Section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by this act, may sue therefore in any Circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit including a reasonable attorney's fees.

SEC. 8. (Provides the word person or persons may be deemed to include corporations and associations.)

INTENTION OF THE LEGISLATURE GOVERNS.

The application of this act will be discussed in the light of some of the well known rules for the construction of statutes. Statute law has been defined to be the will of the legislature, and it is the province of courts to determine what was the intention of the legislative body in passing any act under consideration.

Wilkinson v. *Leland*, 2 Peters, 662.

Sutherland on Statutory Construction, Sec. 234.

United States v. *Winn*, 3 Sumner, 209-211

United States v. *Rhodes*, 1 Abbott (U.S.), 36.

Atkins v. *Disintegrating Co.*, 18 Wallace, 301.

United States v. *Freeman*, 3 Howard, (U. S.), 565.

American and English Encyclopedia of Law, Vol. 23, 297.

Koch v. *Bridges*, 45 Miss., 259.

Winslow v. *Kimball*, 25 Me., 493.

The intention of the legislature should absolutely control the action of the judiciary, and technical rules of construction, if they should be in conflict with such intention, should yield.

The court in the case of *Wilkinson* v. *Leland*, *supra*, said with reference to this matter:

"Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature."

Again it is said in the case of *Atkins* v. *Disintegrating Co.*, *supra*:

"The intention of the law makers constitutes the law."

And again in the case of *The United States* v. *Freeman*, *supra*, the following language used by the court in 4 Dallas, 14, is quoted with approval:

"The intention of the legislature when discovered must prevail, any rule of construction declared by previous acts to the contrary notwithstanding."

Sutherland on Statuatory Construction, Section 234, says:

"If a statute is valid it has to have effect according to the purpose and intent of the law maker. The intent is the vital part, the essence of the law."

In the case of *The United States* v. *Winn*, *supra*, Justice STORY said in part:

"It appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature."

In the American and English Encyclopedia of Law, Vol. 23, 297, the same principle is stated in the following language:

"Statute law is the will of the legislature, and the object of all judicial interpretation of statutes is to determine what intention is conveyed, whether expressly or by implication, by the language used."

The court in *Koch* v. *Bridges*, said:

"The intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained the courts have no other duty to perform than to execute the legislative will. * * * *And courts should adhere to the cardinal rule that the judiciary functions are always best discharged* by an honest and earnest desire *to ascertain and carry into effect the intention of the law-making body.*"

In *Winslow* v. *Kimball*, *supra*, this language is used:

"But statutes are to receive such a construction as must evidently have been intended by the legislature. To ascertain this we must look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied."

This intention is first of all to be gathered from the act itself. It is assumed that any words or phrases used in the act shall be construed in their popular and common acceptance, unless the subject-matter itself indicates that they are to be used in some technical sense. If the language of this act is in no way ambiguous then it is unnecessary to resort to any special rules of construction to determine the meaning of Congress in the passage of this law.

SUCH INTENTION GATHERED FROM THE HISTORY OF THE TIMES.

If the provisions of this act shall seem in any wise ambiguous reference should be made to the various rules of construction to determine what the legislature had in mind when it enacted the law. And in such case, statutes should be interpreted according to the light of the history of the time, and with a view to the common law before the passage of the act.

In the construction of the statutory or local law the state of the country may be recurred to in order to ascertain the reason, as well as the meaning, of the law.

Preston v. *Brouder*, 1 Wheaton, 121.

Aldridge v. *Williams*, 3 Howard (U. S.), 24.

United States v. *Union Pacific Railway Co.*, 91 U. S., 79.

Platt v. *Union Pacific Railway Co.*, 99 U. S., 48, 64.

Sibley v. *Smith*, 2 Mich., 498.

Keith v. *Quinney*, 1 Ore., 366.

People ex rel. v. *Supervisors*, 70 N. Y., 236.

This principle is very well stated in the case of *Preston* v. *Brouder*, *supra*. There it is said:

"In the construction of the statutory or local laws of the state it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of the many provisions in them, to enable a court to apply with propriety the different rules for construing the statutes."

Again, in the case of *Aldridge* v. *Williams*, *supra*, this court said that it would look, "if necessary, to the public "history of the times in which it was passed."

In the *United States* v. *The Union Pacific Railway Co.*, 91 U. S., 79, the language of the court in that case is as follows:

"But courts, in construing a statute, may, with propriety, recur to the history of the times in which it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions in it."

And again in the case of *Platt* v. *Union Pacific*, *supra*, it is said:

"But in endeavoring to ascertain what the congress of 1862 intended, we must as far as possible place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

The courts of the various states are in harmony with the doctrine of this court on that subject.

In *Sibley* v. *Smith*, *supra*, the Supreme court of Michigan enunciated the same rule in the following language:

"We are authorized to collect the intention of the legislature from the occasion and the necessity of the law—from the mischief felt and the object and remedy in view."

So the Supreme court of Oregon in the case *Keith* v. *Quinney*, *supra*, quoted with approval the following language:

"That such an instruction ought to be put upon a statute as may best answer the intention which the makers had in view, and this is sometimes to be collected from the cause or necessity of making it."

And in New York likewise we find the rule supported in the case of *The People ex rel.* v. *Supervisors*, *supra*, where the court said:

"We may look to the occasion of the enactment of a law to assist us in determining its character."

In Ohio the same rule is laid down in the case of

Administratrix Tracy v. *Administrator Card*, 22 Ohio state, 439.

Cincinnati Gas Light & Coke Co. v. *Avondale*, 43 Ohio state, 267.

HISTORY OF THE TIMES AT THE PASSAGE OF THIS ACT.

All who are familiar with current affairs are aware of the prominence that has been given in the past few years to the discussion of economic questions. Perhaps no topic is so prominent in the public mind to-day, and has been so prominent in the last five years as the questions which involve capital and labor and the production and distribution of wealth.

Spelling on Trusts and Monopolies, Sec., 122.

It was doubtless in view of the current discussion of the time that Congress was imbued with the idea of enacting legislation which should deal with some of the abuses and evils incident to the production and distribution of wealth.

Von Halle on Trusts, Chapter II.

The invention of machines and the improved and new methods of distribution have in a few years worked a great change in all industrial and social life. The small farmer, the old-time mechanic, the small tradesman, shoemaker, harness-maker and the like have passed away on account of new and improved methods of production and distribution. The better facilities for trade and commerce brought about by the use of steam and

electricity, and its application to railroads and steamships, together with the invention of wonderful labor-saving machinery, have brought great masses of men together in cities and made it impossible to produce with the hand tools of twenty years ago; this has made production possible only by the aggregation of large numbers of men, expensive machinery and large amounts of capital. The same causes have tended to work similar changes in the industrial life of the country, and to replace the small farms with their old tools, the scythe, the cradle and the flail, with the large farms, with their improved machinery, mowing machine, reaper and threshing machine.

The great railroad corporations and systems, by the aid of modern invention and modern business methods, have aided this tendency to centralization by making transportion comparatively easy and cheap.

Not only have improved machinery and transportation made it economical to do business in large stores, factories, mills and on large farms, but the modern spirit of organization has so far entered into all business pursuits that doing business by wholesale is a much cheaper and more economical way of doing business for this reason alone. The necessity of using expensive machinery and employing a great number of men to produce articles economically, the organization that is necessary to manage great factories, stores and railroads, the advantage coming from organization and large business corporations have also tended to make it impossible for people of small means to successfully carry on the business enterprises of the day. The employment of great numbers of men in one factory or mill, the rapid and easy methods of distribution and the advantage of

organization as shown in great department stores, have naturally built the large city in the place of the small towns and villages of years ago. With all of these commercial and industrial enterprises in the hands of a few men and few corporations, because of the vast amount of capital required for their management, combinations in the shape of pools and trusts must be the logical result. (Von Halle on Trusts, page 117.) The political economist years ago laid down the maxim that "where "combination is possible, competition is impossible."

As these industries constantly tended to fall into the hands of fewer individuals and corporations, increasing in wealth and power, they very soon learned that it was to their mutual advantage to combine, if for nothing else, than to protect themselves. Combination for the limiting of production and combination for controlling prices is the history of all enterprises of the past few years. All the steel rails manufactured in the United States are produced by a few corporations. The prices charged by each are the same, and whether the mills stand idle or are employed, the dividends accruing are the same. The anthracite coal mines are owned by a few railroad companies. The amount of coal that the consumers are allowed to use is limited by the combine, so that the price may be easily regulated by the supply. There are six or eight railroad companies operating lines between Chicago and New York. The charges are the same on all, unless one of them clandestinely furnishes special rates. One great corporation has for years furnished most of the oil consumed in the United States. By "business" methods they are able to control the supply of oil, and also its price.

This centralization of business in the hands of pools

and trusts has been increased in the last few years with a rapidity heretofore unknown in the history of the world. It has been due to natural causes, to the application of steam, and the invention of new machinery, and the improved methods of production and distribution. To causes that are so potent that all the legislation of the world has been powerless to stem the tide. Scarcely a necessity of modern life can be procured except through some trust or combination. Oil, iron, buttons, sugar, matches, whisky, meat, copper, lead, tin, coal, gas, glass, leather, rubber, asphalt, lumber, coffee, as well as a great number of other articles can be procured only from trusts. (See list in Von Halle "Trusts" page 328, *et seq.*) So general is this modern method of transacting business that we are informed by the press that the receiver of the whisky trust, appointed by a court, has also joined a larger trust.

All these matters have been commonly discussed for years. Almost every newspaper, periodical and book that has appeared in the last few years has had some reference to these modern methods of production. On the lecture platforms, in pulpits, in political campaigns allusions to this subject have been so constant as to force all other questions into the background.

Not only has discussion of trusts and pools been persistent and constant but the great organizations of labor, both here and in Europe, have become so much a factor in social life, that even the most ill-informed could not ignore their presence. There is scarcely an industry or trade but what is organized. These various trades and industries are organized into larger bodies. The Knights of Labor, The American Federation of Labor, The American Railway Union, and many other great

organizations are so well known to all students of current affairs, and even to the most casual observer, that it would be a mark of the densest ignorance not to have some information concerning them. Labor organizations and working people have met this great growth of trust and pool by strikes. For many years the word strike and boycott has been as well understood as most any other term, when speaking of industrial life.

For more than 100 years the strike has been a potent factor in industrial life. The increase of strikes in modern days is as phenomenal as the growth of trusts. As it is almost impossible to read a newspaper that does not contain some account of a trust, it is almost equally impossible to find one that does not contain some account of a strike. The literature of the day is filled with this warfare between the contending forces of capital and labor. It may be a railroad strike, a coal miner's strike, street car strike, or a strike in cotton mills or woolen mills, or glass factories, a strike of telegraphers or 'longshoremen, but some strike at least is always confronting the public as a topic for everyday discussion to the unthinking, and for serious consideration by those who have an honest interest in the welfare of the people. It would probably be impossible to find one member of Congress who voted for the anti-trust law, who did not in his campaign for election have some association or dealings with labor organizations, not one single member who did not make speeches to capture the votes of workingmen, who had knowledge more or less of labor organizations and boycotts, not one senator but what had met these great organizations of labor as practical live factors in their election and re-election to the places they occupy. In fact

probably no other factor so largely entered into the immediate consideration of senators and members of Congress as the various labor organizations of the United States. It was in this atmosphere and in the midst of this history that this bill was presented and discussed for months in both houses of Congress. All of its provisions should be interpreted in the light of these common facts that are well known to every man of ordinary intelligence.

In every line of this act is the clear purpose that its provisions were meant to apply to combinations in the shape of trusts and pools, these modern devices that are controlling the necessities of life and the welfare of the people. In no place is there any mention of any labor organization or strike or boycott or the slightest reference that would be construed by men of ordinary intelligence as an intention to apply this law to the combinations of laboring men, or strikes, or boycotts. It is utterly inconceivable that Congress discussing this question for weeks and passing upon this bill, in view of the whole industrial history of the time could have overlooked some of the most important factors of industrial life. The fact that organizations of working people and strikes are not included, clearly shows that they were meant to be omitted from the law.

The title of this act shows plainly that it was meant to affect those great business trusts and combinations that are engaged in trade and commerce, and that injure and despoil the people by monopoly and exaction. For hundreds of years combinations of these kinds, monopolies for the restraint of trade, for the forstalling of the markets have been unlawful and criminal. For years by the common law of both England and America, these

combinations of trade and commerce organized into pools and trusts, combining to regulate production, distribution and prices have been crimes. In most of the states where statute law is the only criminal law combinations of this kind are crimes.

THE DEBATES IN CONGRESS MAY BE REFERRED TO TO SHOW HISTORY OF TIMES.

The general condition of the country during the time of the passage of this act is still further shown by the debate of the United States Senate during the discussion of the bill. This, while not controlling, still furnishes a source from which the court may ascertain the evil aimed at by the law.

United States v. *Patterson* 55 Fed. Rep., 605-631.

Also

Bishop on Statutory Crime, Sec. 76.

And this court in the case of the *Holy Trinity Church* v. *U. S.*, 143 U. S., 457, in interpreting the act of February 6, 1885, "An Act to prohibit the importation and "immigration of foreigners and aliens under contract to "perform labor in the United States," etc., referred to the reports of the committees of both the Senate and the House of Representatives as a circumstance throwing light upon the intention of Congress in passing the act, and said:

"We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstance surrounding the appeal to Congress, *the reports of the committees of each house*, all concur in affirming that the intent of Congress was to stay the influx of this cheap unskilled labor."

Within the limit and light of the above authorities we respectfully draw the court's attention to the debates had upon the anti-trust law as shown by the Congressional Reord.

In the 21 Congressional Record, part 3, page 2457, Senator Sherman uses the following language:

"But associated enterprises and capital are not satisfied with partnerships and corporations competing with each other and have invented a new form of combination commonly called trusts that seeks to avoid competition by combining and controlling corporations, partnerships and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman or a president. The sole object of such a combination is to make competion impossible. It can control the market, raise or lower prices as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the party composing it. The law of selfishness, uncontrolled by competion, compels it to disregard the interest of the consumer. *It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors.* Such a combination is far more dangerous than any heretofore invented, and when it embraces a great body of all the corporations engaged in a particular industry in all the states of the union, it tends to advance the price to the consumer of any article produced it is a substantial monopoly injurious to the public, and by the rule of both the common and civil law is null and void and the just subject of restraint by the courts or forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime and the individuals engaged in it should be punished as criminals. It is this kind of a combination that we have to deal with now."

And again, on page 2459, Senator Sherman uses the following language:

"I might state the case of all the combinations which now control the transportation and sale of nearly all the leading productions of the country that have recently been made familiar by the public press, such as the cotton trust; the whisky trust, the sugar refiner's trust, the cotton bagging trust, the salt trust, the copper trust, and many others, some of which have been the subject of legislative inquiry and others of judicial process; but it is scarcely necessary to do so as they are all modeled upon the same plan and involve the same principles. They are all combinations of corporations and individuals of many states forming a league and covenant under the control of trustees with power to suspend the production of some and enlarge the productions of others, and absolutely control the supply of the article which they produce, and with a uniform design to prevent competition, to break it down wherever it appears to threaten their interest."

And again, on page 2562, Senator Sherman uses the following language:

"Now, let us look at it. The bill as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and design to carry out a certain purpose, which the laws of all the states and of every civilized community declare to be unlawful. It does not interfere in the slightest degree with voluntary associations made to effect public opinion to advance the interest of a particular trade or occupation. It does not interfere with the Farmer's Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of the production of their crops, and to secure intelligent growth and to introduce new methods. No organization in the country can be more beneficial in their character than the Farmers Alliance and farmers associations. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them. And so the combinations of workingmen to promote

their interests, promote their welfare, and increase their pay, if you please, to get their fair share in the division of production and are not affected in the slightest degree, nor can they be included in the word or intent of the bill as now reported."

Senator Hoar, in part 4, page 3146, uses the following language:

"The complaint which has come from all parts and all classes of the country of the great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up."

So on page 3147 Senator George, of Mississippi, expresses the same idea:

"It is well known that the great evil of these combinations, these conspiracies they are called, these monopolies, as they are dominated in the bill, consist in the fact that by combination, by association, there have been gathered together the money and the means of a large number of persons, and under these combinations or conspiracies, or trusts, this great aggregated capital is wielded by a single hand and guided by a single brain, at least by hands and brain acting in complete harmony and co-operation, and that in this way, by this association, by this direction of this immense amount of capital by one organized will, to a very large extent these wrongs have been perpetrated upon the American people.

They come about by an association of men of large capital, living in various states of the union. They come about by corporations organized in the various states of the union acting in concert. They come about too, by single individuals organizing as a single corporation in one state of the union. By the use of this organized force of wealth and money the small men engaged in competition with them are crushed out, and that is the great evil at which all of this legislation ought to be directed."

The whole debate of both the Senate and the House of

Representatives referred to the great combinations of capital, the great pools and trusts which are so large a part of the history at the present time. This history of the condition of the time clearly shows the state of the public mind, the enviroment from which this bill was drafted, the needs it was meant to serve, the class of people intended to be reached and the kind of men and women, the farmers, the working people, the great middle classes sought to be benefited by the passage of the act.

It seems almost unnecessary to call special attention of the court to any particular portion of this act. In view of the history of the country at the time of its passage, and the condition of the law for hundreds of years, it seems as if every section and every line of the act clearly shows that the law was meant for the purpose of preventing the monopolization of trade and commerce by what is known as the forestalling of the market.

The Several Sections of the Act should be Interpreted Together.

It is a well known principle of construction that the whole statute should be interpreted together. It should be construed as one act, and its meaning, object and intent should be gathered from the whole statute. This is particularly true where it is not evident that special sections or special provisions were meant to cover different subjects.

United States v. *Freeman*, 3 Howard, U. S., 565.

Pennington v. *Coxe*, 2 Cranch, 52.

These cases decided by this court are all that it will be necessary to cite to substantiate the proposition above laid down, that in construing an act of the Legislature, its meaning, object and intent should be collected from the whole statute.

In the Freeman case the court said:

"In order to test the legislative intention the whole statute must be inspected."

And in the Coxe case:

"Every part of the act is to be taken in view for the purpose of discovering the mind of the Legislature."

Every section of this act is plainly applicable to the monopolization of trade and commerce. Several of the sections could not possibly have any other application. There is nothing anywhere in the law to show that any special objects are aimed at by the separate provisions.

Section 2 of the act is directed specifically to "persons who shall monopolize or attempt to monopolize, or "shall combine or conspire to monopolize any part of the "trade or commerce," etc. Clearly nothing but combinations of individuals and corporations engaged in business and seeking by modern business methods to monopolize commerce or markets could be included in the terms of this section. Section 6 provides that any property owned under any contract or by any combination of persons in conspiracy and being the subject thereof named in section 1 of this act, etc., * * * shall be forfeited, etc. It could not be claimed that any reference could be drawn from any word in this section, that any application could be made, excepting to such property as is owned, controlled and monopolized by individuals and corporations engaged in forestalling the market. This property is subject to forfeiture by this section, and this

section especially refers to the first section of the act to define the kind of combination or conspiracy under which property must be held to be made subject to the forfeiture provided by the law.

Section 1 of this act, which defines the combinations and conspiracies against which this legislation is directed, is drawn with almost as equal certainty as sections 2 and 6. It provides that every contract or combination, in the form of trust or otherwise, or conspiracy in restraint of trade is illegal. It would not be contended that the phrase "combinations in the form of trusts" had a doubtful meaning. Combinations in the form of trusts are so common and have been made in so many kinds of business that when the phrase is used today every person understands that it means those combinations of corporations or of different business interests which are associated together in one partnership, each having a share of the profit of the common product of all. These trust combinations are dangerous to the public welfare because of the large aggregations of capital engaged in a common enterprise, because of the power given by one corporation furnishing all of a certain kind of product, to control prices, because of the absolute power given these great aggregations of capital to prevent competition and to wholly control the quantity, quality and price of the commodities that the people shall be allowed to use. No doubt there are those who believe that a combination of working men acting together, forming themselves into one great body with common purposes and common interests, with a power in itself to work, or refuse to work except upon such terms as they may dictate, is a power equally dangerous. But it is plain that Congress never meant to provide that such combinations

were illegal; Congress evidently did not mean to provide that members of labor organizations even though their purpose might be to form a complete labor trust and monopolize the labor market should be guilty of a conspiracy for becoming members of such organization. If Congress ever had intended to make criminal combinations of working men organized into a labor union it would have used such plain language as would clearly have indicated its purpose and intent.

"Contracts in restraint of commerce" or "conspiracies "in restraint of trade or commerce" either taken separately or in connection with the rest of this act, evidently meant such contracts and conspiracies in relation to the ownership, control, production or sale of property as tend to change the free laws of supply and demand, as tend to limit production or restrain commerce so that those persons or corporations who make such contracts or enter into conspiracies may be able by means of their resources and power to create scarcity, and to control prices at their will and to prevent that free competition in trade which the common law has ever sought to protect.

It would be a violation of the plain and obvious meaning of words to hold that the restraint of trade meant impeding the progress of a locomotive, by tearing up the rails or by the forming of a mob to prevent the removal of goods or by the refusal of employes to work. It could scarcely be contended that a band of train robbers were engaged in a conspiracy in restraint of trade. The obstruction of trade, the prevention of trade, the refusal of men to work for a railroad company, the ordering of a strike, or the forming of a great railroad organization, each man of whom should voluntarily quit work and re-

fuse to handle goods could not in the meaning of this statute or in the ordinary acceptance of its terms be held to be a restraint of trade.

The Evil Aimed at is an Evil of a Contractual Nature.

The evil aimed at in the legislation against capital is an evil of a contractual character. It was aimed at the growing tendency to combination by voluntary contract in derogation of public rights and public safety. It was for the prevention of associations founded upon a contract between various producers in the various states of the Union, to restrain monopolies of commerce so as to control the prices of the various commodities so controlled and monopolized. These trusts and monopolies were formed by contracts and agreements in the shape of combinations and conspiracies between these various producers among the states, and therefore the evil struck at by the act was an evil of a contractual character. The evil to be feared from these vast aggregations of capital and means of production in the hands of a few was not from fraud or violence, but from the effect of the keeping and performing of such contracts and combinations for the controlling of the productions of the country.

The control and monopoly of the products of the country must be gained by contract and agreement, by combinations and conspiracies between those who produce, whereby the means and capacity of production are placed in the hands of and controlled by a few. When the means of production are placed in the hands of a few, and the quantity of production controlled and regulated by the will of a few, then, and only then, can the product

of the country be monopolized, and it was against such monopolies and trusts, formed as they must be by a common purpose and understanding, by combination and conspiracy among those who have in their hands the means of production. That is the crime and the evil at which the statute in this case was directed. The phrase "in restraint of trade," is almost always used in common law in connection with the word "contract." It was contracts between producers, whereby the production of one passed into the control of the other, that the common law declared constituted a restraint of trade and was illegal, and it is in connection with such contracts that the phrase "restraint of trade" has received its meaning, and has come down to us from the adjudications of the courts of the past. The principles which declared void such contracts in restraint of trade made between two persons were extended and applied to combinations between many persons for the same purpose, for the same reasons which applied to and made void the one, also applied to and made void the other. So that the phrase "in restraint of trade," whether applied to contracts between two individuals or to combinations or conspiracies between many, expresses to us, in accordance with the decisions of the past, some contractual restraints which the parties to the contract or members of the combination or conspiracy have endeavored to place upon their powers of productions by agreements between themselves. The phrase "in restraint of trade" has been inseparably associated with the intention of monopolizing either in a small or a great degree, either by annihilating the production of one, and thereby placing the control of the market in the hands of another, or by placing the pro-

duction of both in the hands and under the control of their joint action. In all cases the danger to the people and to the nation has been the concentration of the production of the country in a few hands. Section 6 of the statute harmonizes with and gives color to the interpretation of the act as herein contended for. That section provides that any property owned under any contract, or by any combination, or pursuant to any conspiracy with and being the object thereof mentioned in Section 1 of this act, and being in course of transportation from one state to another state or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings to those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to the law.

What is the meaning of the phrase "property owned " * * * pursuant to any conspiracy"? It means the property of such trusts and monopolies which as inter-state commerce is passing from one state to another. It certainly can not mean property used in the commission, and for the purpose of committing crimes, such as burglars' tools and counterfeiters' dies. It is property owned pursuant to a conspiracy, and the conspiracy in the statute, therefore, is a conspiracy aiming to control by the making and the furtherance of restraining contracts and the property is the property owned by such conspiracy under the monopolizing contract. A conspiracy which has not for its object an intent to fix control or raise prices to the injury of the public, or in some such way to injure or defraud the public, can not be held to be a contract or conspiracy within the meaning or intention of this statute, although the same may result in raising

prices and may result in restraining trade. Such results would only be the indirect consequences of the conspiracy, and not the purposes and objects thereof, and the conspiracy takes its color and its form, not from its result or effect, but from its intention and its object.

Section 4 of this act, which provides for the enforcement of the law would seem by its terms to contemplate that the provisions of the law apply to property and to the ownership and control and the monopolization of property by individuals, corporations or trusts. To provide for enjoining strikes or strikers, or enjoining labor organizations or mobs would be a procedure not in keeping with the courts of chancery, a remedy wholly inadequate and dangerous of application.

Courts of chancery are concerned with property and property rights. To enjoin trusts engaged in the monopolization of the markets; to restrain contracts and conspiracies forming trusts and combinations to limit production and increase prices, is a legal and salutary power that might well be exercised by courts of chancery. To enjoin the actions of men when those actions have no direct reference to property rights would be to replace the criminal procedure and penal statutes with the chancery powers of courts.

This Being a Penal Statute it Should Not Be So Construed as to Extend to Cases Not Within Its Obvious Scope.

It is a rule of construction that all penal statutes are to be construed strictly in the light of their plain meaning and purpose and not extended to cases which are not

within the obvious meaning of the language employed in the legislation.

American and English Encyclopedia of Law, Vol. 23, 376.

United States v. *Lacher*, 134 U. S., 624, 629.

In the first citation above, this language is used:

"It is the object of the construction of penal, as of all other statutes, to ascertain the true legislative intent, and *the court will not * * * apply such statute to cases which are not within the obvious meaning of the language employed by the legislature.*"

And in the second citation, this language, taken from a quotation, is approved by the court:

"* * * penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; *the court refusing * * * to extend the punishment to cases which are not clearly embraced in them.*"

And the United States Circuit Court of Appeals, for the Eighth circuit, in the case of the *United States* v. *The Trans-Missouri Association*, 58 Federal Reporter, 58, 77, laid down the same rule with reference to the anti-trust act of July 2, 1890. The court, in that case, said:

"The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to penalties thereby imposed, unless the contract complained of is one *that is clearly within the provisions of the statute.*"

Such statutes should be so construed that each person may understand their plain provisions and may know perfectly well what acts constitute a violation of the law. They will not only be punished for a violation of the law, but admonished not to commit one. To construe this statute to include labor organizations, strikes and strikers

would be to go beyond the plain and obvious intent expressed in every line and section. It would have been easy for Congress to have included within the plain meaning of this act those combinations of labor, those strikes and organizations, which every well-informed man understood full well. When Congress left these out of the provisions of the act, it omitted them with a knowledge of the history of the times, with the knowledge of the existence of these organizations and combinations, with the full knowledge of the hundreds of thousands of men forming these combinations, of their prevalance in every portion of the country, and they plainly intended that these should not be included in this act. *To bring them within the pale of this law would mean that judicial interpretations should read into this statute large bodies of men which Congress deliberately left out.* Bodies of men, none of whom supposed they would be included, bodies of men whom public opinion at the time of the passage of the law, did not desire to have included, and the men whom no member of Congress, and no senator would for a minute have thought right or wise to have included in the provisions of this act. We submit that the courts have no right to place within the power or perview of this statute those whom Congress clearly intended to exclude by the terms of this act. To say that a law should be construed to include those things which the legislative body intended to include, is also to say that it should be construed to exclude those things which Congress intended to leave out.

Legislation on Same Subjects by the States.

As further evidence that the purpose and intent of this act was to strike *a blow at trusts* and *kindred monopolies*,

the legislation of the various states of the Union, at about the time of the passage of this act, may be referred to. Acts had been passed by the various states, restraining and making punishable as crimes all such combinations and conspiracies to monopolize and control the industries and productions in various states. The passage of these acts was caused by the popular agitation which swept over the country influencing state legislatures as well as Congress. The growth of trusts had been so fast and alarming as to require the passage of acts declaratory of the common law and fixing to their violation appropriate and severe penalties. Such laws were passed by Alabama, 1890, 1891, Sec. 202; Illinois, 1891, page 206; Iowa, 1890, Chap. 28; Kansas, 1889, Chap. 257; Minnesota, 1891, Chap. 10; Mississippi, 1890, Chap. 36; Nebraska, 1889, Chap. 69; New York, 1892, Chap. 688, Sec. 7; North Carolina, 1889, Chap. 374; South Dakota, 1890, Chap. 154; Tennessee, 1890, Chap. 218; Texas, 1889; Chap. 117. And Ernst Von Halle, in his work on Trusts or Industrial Combinations in the United States (MacMillian & Co., 1895), says: "By the end of 1894, "the federal government, twenty-two states and one ter- "ritory had enacted anti-trust laws."

* * * * *

"Anti-trust laws were passed in 1889 by Kansas, "Maine, Michigan, Missouri, Nebraska, North Carolina, "Tennessee, Texas, and the territories of Idaho, Mon- "tana and North Dakota, and the new states of Wash- "ington and Wyoming introduced provisions in this "direction into their constitutions. In 1890 anti-trust "laws were passed by Iowa, Kentucky, Louisiana, Mis- "souri and South Dakota. In 1891 Kentucky and Mis- "souri introduced provisions into their constitutions. In

"the same year Alabama, Illinois, Minnesota, and the "Territory of New Mexico, in 1892 New York and Wis- "consin legislated to like effect, while in 1893 California "forbade combinations in live-stock, Nebraska in coal "and lumber."

As stated by the brief in another case, "These statutes "in terms simply extend this principle [of common law "*in re trusts*] to combinations or conspiracies to make "such contracts; the object being to get around the prac- "tical difficulty of proving an actual binding contract to "do these acts. In view of the secrecy surrounding "trusts, this difficulty had become a great obstacle in "the way of justice. These acts simply make illegal "any combination organized for the purpose of making "such contracts, whether the contracts are completed or "not. But in almost all it is expressly stated or implied, "that it is combinations proceeding by way of contract "not combinations using fraud or violence, that are "within the contemplation of these statutes. Conspira- "cies to commit frauds or crime were punishable by the "common law of such states."

Federal Legislation Needed.

As shown, at about the time of the passage of this act, many states had passed similar statutes, directed against trusts, monopolies and combinations of a similar nature and kind. Trusts, combinations, and conspiracies to restrict and retrain production and to monopolize the products of the country in the hands of a few, so that prices might be controlled, and the people be compelled to pay what might be asked by those who monopolized the product, have been from time immemorial held to

be against the principle of the common law, in violation of sound public policy," and crimes against the people.

In Liber Assisarum, 27 Edw. III, 138, 139, 1354, we find among other conspiracies to be investigated, that of "merchants who by alliance and covin among themselves "in any year put a certain price on wools which are to "be sold in the country, so that none of them will buy, "or otherwise pass in the purchase of wools beyond the "certain price which they themselves have ordained, to "the great impoverishment of the people."

The power of the states with reference to the matter of trusts and monopolies was necessarily confined to their own boundaries. By the peculiar formation of the political union between the various states, there was a vast domain that lay beyond and above the jurisdiction and power of the state legislatures. Nearly every state in the union has some special production or productions of which it consumes and uses but a small and limited portion; the balance being intended for shipment to other states or to foreign nations for sale and consumption, and immense quantities of the productions of the various states are constantly passing back and forth between the states and foreign nations, from the power and control of the one to the power and control of the other. The volume of this business is such as to form a very considerable portion of the activity of the nation, requiring for its shipment and conveyance innumerable lines of railroad and other avenues, and it is the shipping back and forth of these various commodities from one state to another, and to foreign nations, which constitutes inter-state and international commerce and trade. These avenues of

commerce are the arteries of the nation, and the products and commodities the life-blood and sustaining force of the people. But this vast inter-state and international commerce and trade is without the control of the power and supervision of the various states. With it they can not interfere. Over it they can not throw any mantle of protection, nor can they put any checks or restrictions upon it, for a state has no power to legislate beyond its jurisdiction. If the laws of the United States do not regulate this immense traffic, then the people of the country are without redress, and as the common law is not in force in the United States for punishment of common law crimes, such contracts, combinations and conspiracies, monopolizing and restraining this vast volume of inter-state and international business, and resulting in hardship and oppression to the people, must necessarily have been uncontrolled and the people without a remedy in the courts of the country, either state or federal, until Congress should pass proper acts controlling, restraining and prohibiting such contracts, combinations and conspiracies in restraint of this inter-state and international trade and commerce. Such was the situation which confronted the people of the United States in their battle against the organization of gigantic trusts and monopoly. The action of the states was limited to the trusts formed within their own jurisdictions and their legislation upon the subject was of but little aid or help until the national legislature should co-operate with them in the war against the fast forming and ever growing trust. It was to aid the people of the United States, to meet and cope with this condition of affairs, and to pre-

vent the formation and development of these monopolies of inter-state commerce, and to render adequate protection to the people, that the law of July 2, 1890, was passed.

The Word "Conspiracy" does not Extend Scope of Act.

Judge Woods in his opinion in this case makes a labored argument with reference to the subjects embraced within the provisions of this act, and especially with reference to the scope given to its provisions by the use of the word *conspiracy* in the first section of the act. It seemed to be the opinion of the lower court that the use of the word *conspiracy* made the act much broader in its intent and purposes than if the word had not been used, and that the scope of the provisions of the act by the use of that word brought combinations and conspiracies of working men under and within the intent of the act. The court states that by reason of the use of the word *conspiracy* the act covers more than combinations of a mere contractual character. We think that the attempt to broaden the scope of the act by such an interpretation of the use of the word *conspiracy* is not warranted by a review of the common law cases, and we assert, on the contrary that the use of the word *conspiracy* by the legislature, meant no more than such combinations as may be formed for the purpose and design of engrossing and monopolizing the market, as we have claimed in the preceding part of this brief.

The ownership and control of great enterprises and large amounts of property may be the subject of conspiracy. The statute makes both contracts and con-

spiracies in restraint of trade unlawful. Those contracts made by large commercial institutions and corporations engaged in trade and commerce whereby they combine for the purpose of controlling production and imposing artificial restraints upon trade are contracts in restraint of trade. The coming together of men and the agreement of men together, the confederating together to form pools and trusts, the planning and conniving of merchants and transportation princes for the purpose of controlling trade and commerce, of enhancing prices of limiting productions, these are conspiracies in restraint of trade and commerce.

The common law has over and over again characterized such confederations, combinations and schemings of the controllers of property and commerce as conspiracies in restraint of trade. It is not necessary to go beyond the plain obvious provisions of this statute, beyond what Congress clearly had in mind at the time of the passage of this statute, to ignore all the history that led up to the enactment of this law for the sake of finding some especial use for the word conspiracy that has for hundreds of years been used in the very sense which Congress plainly intended by the passage of this act.

In framing a law to meet such contracts and combinations, the word *conspiracy* would necessarily and naturally be used by the legislature by reason of the previous use of the word by the courts with reference to just such contracts and combinations in restraint of trade, which use dates back as early as the year 1676, when combinations in restraint of trade by reason of the engrossing and monopolizing of the market were declared to be *conspiracies*, and that therefore the use of the word *con-*

spiracy does not broaden and extend the act to include any other combinations than those formed for the purpose of monopolizing the market. We will see from these cases that courts, from the earliest times, have used the word *conspiracy* in conjunction with the words "contract" and "combination" in denominating such monopolies, and therefore the framers of the act, taking cognizance of and being bound by the common law use of words, properly and rightly used the word *conspiracy* in this act for no other purpose or intent. In the case of *Rex* v. *Sterling et al., brewers*, 1 Keble, 650 (1676), it is said: "Every *conspiracy* to raise the price of pep-"per is punishable, or any other merchandise." In an analogous case in 12 Modern, page 248 (1693), "leave "was granted to file an information against several plate "button makers for combining by covenants not to sell "under a set rate. It is fit that all confederacies by "those of a trade, to raise their rates should be sup-"pressed."

Again, in the case of *King* v. *Norris*, 2 Kenyon 300 (1758), leave was given to file an information against the defendants, who were separate proprietors of salt works in Droitwich for a *conspiracy* to raise the price of salt, and in that case Lord MANSFIELD declared that, "If any "agreement was made to fix the price of salt or any other "necessity of life (which salt emphatically was) by people "dealing in that commodity, the court would be glad to "lay hold of an opportunity * * * to show their "sense of the crime * * * for all such agreements "* * * * ought to be discountenanced."

Wharton, in his work on Criminal Law, Vol. 2, Section 1851, refering to forestalling, regrating and engrossing of the markets, says: "Questions of this kind have usually

" come before the courts on indictment for *conspiracy*, for " it is by *conspiracy* that extortions of this kind are gen- " erally wrought."

AGNUS, J., in delivering the opinion of the court in the case of the *Morris Run Coal Company* v. *Barclay Coal Company*, 68 Pa. State, 173-186, referring to the contract in the case, which was a contract in restraint of trade made between five coal companies to control the price and production of coal, said, " Such a combination " is more than a contract, it is an offense." And again, " Every 'corner,' in the language of the day, whether it " be to affect the price of articles of commerce, such as " bread stuffs, or the price of vendible stocks, when ac- " complished by confederation to raise or depress the " price and operate the markets, is a *conspiracy*. The " ruin often spread abroad by these heartless *conspiracies* " is indescribable, frequently filling the land with starv- " ation, poverty and woe."

In the case of *Hooker* v. *Vandewater*, in 4 Denio Report, 352, the case wherein the proprietors of five several lines of boats engaged in the business of transporting passengers and freight on the Erie and Oswego canals, entered into an agreement among themselves to run for the remainder of the season of navigation at certain rates for freight and passengers then agreed upon * * * and to divide the net earnings among themselves according to certain proportions fixed in the articles, the court said: " The " object of this combination was obviously to destroy com- " petition between the several lines of the business en- " gaged in. It was a *conspiracy* between the individuals " contracting to prevent a free competition among them- " selves in the business of transporting merchandise, " property and passengers upon the public canals."

In Wright on Conspiracy, page 180, the case of *Keene* v. *Poole & Kent Co.*, a case is mentioned wherein Judge DANIELS, of the Supreme Court of New York, said, "The "law will not permit parties owning property and con- "templating the purchase and sale of more of it, to com- "bine together to keep it off the market, and in that "manner to oblige the public to pay a larger price for "the article than it would otherwise secure. Such a "combination is an unlawful *conspiracy*, punishable as "a crime."

In Ray on Contractual Limitations, it is said, on page 309: "Any agreement between large operators in any "article to combine to thus rule the market and obtain "exorbitant prices, is an unlawful *conspiracy* against "trade, and void."

From the above cases it appears that the word "con- "spiracy" has been used by the courts in conjunction and in connection with the words "contract" and "combination" in denominating and denouncing combinations and contracts in restraint of trade in the form of trust or other contractual nature. Was the use of the word conspiracy by the courts in those cases tautology, the same use runs from the earliest reports down to today? Was the language of the Supreme court of New York useless when it said, "Such a combination is an un- "lawful *conspiracy*, punishable as a crime"? We think that such can not be claimed. The legislature is presumed to know the law and to use words in the meaning given to them by the law. Would any legislature framing an act to prevent monopolies, and to declare illegal contracts and combinations in restraint of trade which were made for the purpose of engrossing, forestalling and

regrating the market, leave out of their act the word *conspiracy*, when the courts themselves when referring to such contracts and combinations had invariably denominated them conspiracies? We therefore see that the use of the word *conspiracy* in this act when referred to in the light of a law which existed and was laid down by the courts prior to its passage, was quite proper and essential as against contracts and combinations to monopolize, and can not be taken to extend the meaning of the act to any other contracts or combinations. That the original purpose of the act was to cover cases of trust and other monopolies and combinations of capital has been repeatedly admitted by all the courts that have construed the act. Such intention is to be gathered from the history of the times when the act was passed, and from the debates on the bill in Congress, showing the history of the evil aimed at, and it is shown above that the use of the word "conspiracy" does not, and can not be taken to extend the act to any further or other object than the original purpose of the act. The court then in considering the intent of this act will find both from the history of the times in which the act was passed and from the terms of the act itself that it was aimed at contracts, combinations and conspiracies to monopolize trade and commerce between the states.

The Meaning of the Word "Conspiracy" will be Restrained if Necessary.

Suppose for the moment, and for the purpose of the present discussion, that we leave out of our consideration the use of the word conspiracy by the courts as above, and only consider, as above

shown, that the intention of the legislature in passing this act, as derived from the history of the times in which it was passed, clearly shows that the act was aimed at the trusts, contracts and combinations in restraint of trade for the purpose of monopolizing the same. The courts will so construe the words of the act as to confine them to such purpose, and will not enlarge or construe the word as meaning anything else than such purpose and intention of the legislature.

In Sutherland on Statutory Construction, Sec. 219, page 290, it is said:

"The application of the words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute."

Again, in the case of *Maxwell* v. *Collins*, 8 Ind., 40, it is said:

"It is a well settled rule of interpretation of statutes that the application of the words of a single statute may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute."

In the case of *Pope* v. *Doherty*, 2 De G. & J. Reports, 623, an English court said: " * * * but it is not be- "cause general words are used in an act of parliament, "every case which falls within the words is to be gov- "erned by the act. It is the duty of courts of justice so "to construe the words as to carry into effect the mean- "ing and intention of the legislature."

Hawkins v. *Ghacreole*, 6 De G. M. & G., 1–22, the court said: " * * * we have, therefore, to consider "not merely the words of the act of parliament, but the

" intent of the legislature to be collected from the cause " and necessity of the act being made, from a compari- " son of its several parts, and from foreign (meaning ex- " traneous) circumstances so far as they can justly be " considered to throw light upon the subject." And again, " but in construing acts of parliament the words " which are used are not alone to be regarded. Regard " must also be had to the intent and meaning of the " legislature." Again, referring to the case of *Stradling v. Morgan*, they quote the following: " That the judges " of the law in all times past have so far perused the " intent of the makers of the statute that they have ex- " pounded acts which were general in words to be but " particular where the intent was particular." Further on they quote, " statutes which comprehend all things " in the letter, they have expounded to extend to but some " things," and " those which include every person in the " letter they have adjudged to reach to some persons " only, which expositions have always been founded upon " the intent of the legislature, which they have collected " * * * by considering the cause and necessity of " making the act * * * so that they have ever " been guided by the intent of the legislature."

Sutherland on Construction of Statutes, Sec. 219, page 290, says: " The true meaning of any clause or pro- " vision is that which best accords with the subject and " general purpose of the act."

In the *Eureka case*, 4 Sawyer, 302-317, Mr. Justice FIELD said: " Instances without number exist where the " meaning of words in the statutes has been enlarged or " restricted and qualified to carry out the intention of the " legislature. The inquiry, when any uncertainty exists, " always is as to what the legislature intended. When " that is ascertained it controls."

All this is but the statement of an elementary rule, that a thing which is within the letter of a law is not within the law, unless it is also within the meaning of the law. One purpose of the construction and interpetration of the statutes is, as we have before argued, to get at the meaning and intention of the legislature, and we think that in doing that in this case no other construction or interpretation can be placed upon the act of July 2, 1890, than the one for which we have contended.

THE OBJECT AND INTENTION OF CONSPIRACY GOVERN.

It is plain from the whole language of this statute, from the history of the time, and from the previous state of the common law that what was aimed at was such combinations, conspiracies and restraints of trade as tended to raise prices, control commerce and through this generally to injure the public. It was not intended by this statute in any way to settle questions between contending forces, or even to affect insurrections, riots or mobs. It was intended to protect the public, and to protect them against such things as tended to injure them by raising prices, controlling commerce, or thwarting the great natural laws of supply and demand, which have ever been considered by the courts and economists as salutary and necessary forces in industrial and commercial life. It must also have been meant that any damage to the public by reason of interference with prices, and the laws of supply and demand must be permanent in its nature, must be a damage clearly contemplated, must grow out of some act whose purpose was to affect the public by raising prices, and by controlling the

laws of supply and demand. It could not be sufficient that this should accidentally follow from some cause entirely foreign from the result, from some act which was clearly directed to some other purpose, and not the purpose of raising the prices of commodities and thus injuring the general public.

In the case of the *U. S.* v. *Knight*, recently decided by this court, Chief Justice FULLER, delivering the opinion of the court, uses the following language:

"Contracts, combinations or conspiracies to control domestic enterprises in manufacturing, agricultural mining, production in all its forms, or to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent. And such result would not necessarily determine the object of the contract, combination or conspiracy."

Nothing can be plainer than that the acts complained of in this information, and this bill were not acts for the purpose of raising prices or interferring with the natural law of demand and supply.

Judge WOODS uses an illustration by which he seeks to show that a combination of capitalists might resort to the same means, and would therefore fall under the provisions of this act. In his opinion he uses the following language: "If, for example, the manufacture of "other sleeping cars in their own interests should enlist "the brakemen and switchmen, or other employes of the "railroads, either individually or in associated bodies, in a "conspiracy to prevent or restrain the use of Pullman "sleepers by refusing to move them, by secretly uncoupling "or by other elusive means, the monopolistic character of "the conspiracy would be so evident that even under the

"theory that the statute is aimed at, contracts or com-
"binations intended to engross or monopolize the mar-
"ket, it would be agreed that the offense ought to be
"punishable. But in such a case, if the officers or agents
"of the car companies, who might or might not be capi-
"talists, would be individually responsible for violating
"the statute, upon what principle could the brakemen
"or switchmen be exempt."

In view of this illustration it seems really remarkable that Judge Woods could have missed the point of this case. In the example he puts, the object would clearly be the monopolization of trade, the attempt on the part of a rival company to monopolize all the trade to itself. If this were the clear intent and purpose of the conspiracy used as an illustration, it ought plainly to fall under the provisions of this act. If the workmen embarked in that conspiracy for the purpose of monopolizing the carrying trade to some other company, they might be guilty under this statute. If they were simply the tools and instruments, without knowing the purpose, they could then be engaged in no conspiracy to monopolize trade or commerce. Under the illustration of Judge Woods the whole gist of the conspiracy is to monopolize trade. The means have nothing whatever to do with the affair. Under the case made by this information there is plainly no such intent. The acts complained of were not made for the purpose of monopolizing trade to any corporation or to any individual. They were simply made in a general contest between the labor organization on the one side and the Pullman Company upon the other, for the purpose of effecting a settlement of the Pullman strike, not made and not claimed to be made for the purpose of monopolizing the trade or commerce of the country.

Decisions Construing Anti-Trust Law.

Before the strike of last summer, out of which these proceedings grew, the application of this law had been twice called in question, once in a Circuit and once in a District court of the United States.

The first time this question was passed upon, so far as we are informed, was in the opinion rendered in *United States* v. *Patterson*, February 28, 1893, and reported in the 55th Fed. Rep., 605, 640. This case was exhaustively argued and seems to have been better considered than any of the subsequent cases. It was also passed upon when there was no great public excitement, and in a judicial atmosphere where no possible considerations except the plain considerations of the case and the law would be liable to have any influence, however indirect, upon the court. The arguments in this case, as shown in the report, were very exhaustive, and we call the attention of the court to the able argument of Mr. H. W. Chaplin, who represented the defendants in in the case. In passing upon the applicability of this statute, Judge Putnam, United States Circuit Judge, defined its scope and application in such a way as to plainly exclude any such application as was made in this case. The following language used by the judge in that opinion, seems to us to plainly define the application of the law:

"I think it is useful to analyze the statute. Separating it into parts, we have: First, contract in restraint of trade; secondly, combination in restraint of trade; and, third, conspiracy in restraint of trade. There can be no question that the second and third parts, as thus put, receive their color from the first. Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its

terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in *pari materia*, and so has, as its basis, the engrossing or control of the market, or lines of trade. The sixth section also leads in the same direction, because it provides for the forfeiture of property acquired pursuant to the conspiracy. Undoubtedly the word 'conspiracy' in that section has reference to the same subject-matter as in the first. If the intention of the statute was that claimed by the United States, I think the natural phraseology would have been 'to injure trade,' 'to restrain trade.'

We are now at the point where the paths separate. Careless or inapt construction of the statute as bearing on this case, while it seems to me to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by the way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. Therefore I conclude that there must be alleged in the indictment that there was a purpose to restrain trade as implied in the common law expression 'contract in restraint of trade' analogous to the word 'monopolies' in the second section. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restrain of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise."

The next time this statute was construed was on March 25, 1893, in an opinion by Judge Billings, a district judge, then sitting in New Orleans. This opinion reported in

54 Fed. Rep., 994, we submit does not show the same consideration of the case nor the same careful research as the one quoted above. Without any effort to reason in relation to the proper construction of this statute or what was intended to be covered by the act; the court still holds that a strike of a labor organization was meant to be included within the province of the statute. This decision has since been sustained by the Court of Appeals, but without going into the reasons which influenced the opinion of the court. We submit that this decision throws no light whatever upon the construction of this act and can in no wise guide the court in their labors in this case.

Since the inauguration of the strike and growing out of the same form of injunction used in this case, and moved from a common center, four United States judges have construed this act as applicable to labor organizations. These four judges were all of them passing upon this same question, upon this same strike, upon this same bill and under exactly the same circumstances and conditions during the strike of July last. Judge Barker, District Judge, sitting at Indianapolis; Judge Taft, Circuit Judge, sitting at Cincinnati; Judge Phillips, District Judge, sitting at St. Louis, and Judge Woods, who made the order in this case. This proceeding is, to all intents and purposes, brought to challenge the correctness of the decision of all of these judges, growing out of the same act, and we believe will be so construed by this court. Judge Taft, in passing upon this case (62 Fed. Rep., 803, the case entitled *Thomas* v. *Cincinnati, N. O. & T. P. R'y Co., in re Phelan*) was not called upon to pass upon the applicability of this statute. That case was brought as a contempt proceeding for interfering with a railroad in the hands of a receiver and the juris-

diction was upheld upon that point; but Judge Taft, after upholding this jurisdiction was pleased to go further and hold that the acts complained of were also in violation of the statute of 1890, giving as authority the order of Judges Woods, Allen and Grosscup, in issuing the injunction complained of in this case. Here, as in the case of Billings, Judge, no effort is made to show the applicability of this statute. It was not brought in question nor necessary to the decision of this case, but in view of the injunction complained of in this proceeding having been issued by Judge Woods, it was thought desirable to hold that this statute was applicable to the case and to disapprove of the decision of Judge Putnam.

On October 24, 1894, District Judge Phillips in the case of *U. S.* v. *Elliott* also held that this statute was applicable to this case. The case herein cited is reported in 64 Fed. Rep., No. 1, page 27. This also arose from the same strike and was decided after the injunction issued in this case and after the opinion of Judge Taft. We submit that the reasoning presented in this case is nither satisfactory nor judicial, and the most of what is said can have no application to the bearing of this law upon the subject-matter and can throw very little light upon this subject to aid the cause and the same remarks will apply to the decision of Judge Baker. While we do not mean to intimate that these four opinions growing out of the strike of last summer were brought about by the state of the public mind, we still believe it fair to call the attention of the court to the fact that all of these injunctions were issued at a time of great public excitement, all growing out of the same strike, none of them in keeping with the commonly established precedents and

the well settled and recognized principles of chancery and each of them plainly connected with the others. It is too much to presume that the environment of the day and the agitation of the public mind has no influence whatever over judges when the same condition seriously influences all other citizens. It is well that these decisions announcing novel doctrines of law should be thus early brought before this court for review, and we have no doubt but what this court, recognizing the vast importance of the question involved, the great interest, direct and personal, to hundreds of thousands of men, members of labor organizations, will consider this largely as an original question which should be settled in the light of well-established principles and with a full view of the industrial and social conditions of the present.

In the case of the *U. S.* v. *Knight*, recently passed upon by this court, this act of 1890 was construed as it affected what is known as the Sugar Trust. While of course the case involved was not like the case at bar, still the opinion contains observations of the court which would seem are clearly in keeping with what we conceive to be the true construction of this act.

In that case a bill was filed under this act for the purporpose of having certain agreements canceled, by which stock was transferred, the redelivery of the stock to the parties respectively, and an injunction against further performance of the agreement and further violation of the act, to use the language of the court: "The bill "charged that the contracts under which these purchases "were made, *constituted combinations in restraint of trade*, "and that in entering into them defendants *combined and* "*conspired to restrain* the trade and commerce in re-"fined sugar among the several states and with foreign

" nations, contrary to the act of July 2, 1890." In that case it was said, with reference to the act: " It was in " the light of well settled principles that the act of July " 2, 1890, was framed."

* * * * *

" What the law struck at was *combinations, con-* " *tracts and conspiracies to monopolize trade and* " *commerce among the several states or with foreign* " *nations*" and all through the opinion the act is referred to as one to prevent monopolies, and the word " monop- " olies" and the phraze " in restraint of trade" are apparently used interchangeably and as meaning the same thing.

To us it seems that the bill was undoubtedly intended to be filed under the act considered as a whole, and not under any special construction. Such appears to us to be the understanding of the court in deciding the case, and consequently the above construction of the intention of the legislature in passing the act was made of the act as a whole, and not of a portion or section thereof. But if it was filed under any section thereof, and not under the whole act, it must have been filed under the first section, because the bill filed has set out that the purchase of the stock, etc., was " for the purpose of restrain- " ing trade thereof with other states," and again, as before quoted, " The bill charged that the contracts under " which these purchases were made constituted a combina- " tion in restraint of trade, and that in entering into " them defendants combined and conspired to restrain the trade and commerce in refined sugar among the var- " ious states and with foreign nations." Section 1 is the only section which refers to contracts, combinations and conspiracies in restraint of trade, so that it would seem

that the bill, if not filed under the entire act, was filed under the first section; so that in either case the construction of the court of the intention of the legislature in passing the act, either extends to the whole act, as it would seem, or construes the intention of the legislature in passing Section 1 of the act, in either of which cases the construction prevents its application to the defendants, for Section 1 is the only section could under any possibility apply to them and it has never been claimed that the so-called and alleged conspiracy of the defendants was "a combination, "contract or conspiracy to monopolize trade or com- "merce among the states or with foreign nations." And Justice HARLAN, in his dissenting opinion in the same case, referring to the act, says: "It does not strike at "the manufacture of simple articles that are legitimate "or recognized subjects of commerce, but at combina- "tions that unduly restrain because they monopolize the "buying and selling of articles which are to go into inter- "state commerce." It seems to us, although the above construction of the act was made in a case where monopoly was claimed, still, that the construction of the intent of the legislature is full and complete.

We submit that the positions herein taken are correct, and we respectfully contend that the Anti-trust act of July 2, 1890, does not apply to the petitions and gave no jurisdiction to the lower court to entertain the bill filed in this case, and consequently no contempt of court can be charged against petitioners for a violation of the injunction issued in the case unless the jurisdiction of the court to entertain the bill can be sustained on other grounds.

II.

THE INFORMATION CHARGED NO ACTS WHICH ARE ILLEGAL, OR WHICH COURTS HAVE THE RIGHT TO ENJOIN, EVEN IF JURISDICTION WERE ASSUMED, AND LACKS PROPER VERIFICATION.

In contempt proceedings it is necessary that an affidavit, or its equivalent, be filed, in order to give the court jurisdiction. An affidavit is jurisdictional. Without a sufficient affidavit a court is without jurisdiction to proceed. To sustain this position we refer to the following authorities:

Wyatt v. *People*, 28 Pac. (Colo.), 964.
State v. *Sweetland*, 54 N. W. (S. D.), 415.
Batchelder v. *Moore*, 42 Cal., 412.
Wilson v. *Territory*, 1 Wyo., 155.
Thomas v. *People*, 14 Colo., 254.
Ludden v. *State*, 48 N. W. (Neb.), 61.
People v. *Murphy*, 1 Daly (N. Y.), 467.
Young v. *Cannon*, 2 Utah, 56.
State v. *Blackwell*, 10 S. C., 35.
State v. *Hazethorn*, 26 Pac., 937.
State v. *Vincent*, 26 Pac., 939.
In re Nickell, 28 Pac., 1077.

In *Wyatt* v. *People*, 28 Pac. (Colo.), 964, it is said:

" A little contrariety of opinion exists as to whether the warrant of commitment or the order of court must recite the jurisdictional facts. But the overwhelming weight of authority sustains the proposition that the affidavit upon which the proceedings for a constructive contempt are based must state facts which, if established, would constitute an offense, and that if the allegations of the affidavit are not sufficient in this respect, the court is without jurisdiction to proceed: Rap. on Contempt, Sec. 93 and 94, and

cases cited; *Mullen* v. *People*, *supra*; *Thomas* v. *People*, *supra*; *Cooper* v. *People*, *supra*; *Wilson* v. *Territory*, 1 Wyo., 155; *Ex parte Peck*, 3 Blatch., 113; *McConnell* v. *State*, 46 Ind., 298; *Phillips* v. *Welch*, 12 Nev., 158; *Gandy* v. *State*, *supra*; *Batchelder* v. *Moore*, 42 Cal., 412.

Some of the opinions above cited refer the authority for the affidavit to statutes similar to Section 322 of our Civil Code (Colorado), *but the statutes mentioned, and others of like tenor, are simply declaratory in this particular of what may fairly be termed the modern common laws practice, and the rule concerning the materiality of the affidavit should prevail to the same extent, in the absence of statute.* * * * *The position of these authorities, which hold that when the contempt is constructive the affidavits must show the offense, commends itself with irresistible force.*"

This view was further substantiated by the case of *State* v. *Sweetland*, *supra*, which was a proceeding for contempt, and in which the court said:

"The affidavit upon which the proceedings for constructive contempt are based must state facts which, if established, would constitute an offense over which the court has jurisdiction. * * * *The affidavit then, being jurisdictional in its nature, and no presumptions being permissible to sustain it, should clearly show a state of facts that gives the court jurisdiction over the contempt proceedings.*"

In *People* v. *Murphy*, *supra*, Judge DALY said:

"When the misconduct is not committed in the presence of the court, the statute requires due proof by affidavit of the facts charged. *This is requisite to give the court jurisdiction to act in the matter of a contempt alleged to have been committed out of its presence, and without this a court has no authority to order a person to be arrested and brought before it, and to adjudge upon the matter of the alleged contempt.* This was the law before the Revised Statutes were passed."

In *State* v. *Blackwell*, 10 S. C., 35, the court in a case of constructive contempt, used the following language:

"The rule to show cause appears to have been made without affidavits. This is a material objection. All parties charged otherwise than by the oath of the grand jury with contempts other than those committed in the presence of the court, are intitled to have the matters charged stated under oath, the penalties for false swearing being regarded as a safeguard to the liberties of the citizen."

Other authorities might be dwelt upon at length to further illustrate the doctrine that the affidavit is jurisdictional and absolutely necessary, but in view of the foregoing, we deem it unnecessary. A question might arise here as to the fact that the affidavit in this instance is supplied by an information or bill by the district attorney, but that this does not dispense with the requirements incident to the affidavit, and that such information must be sworn to and must have all of the requisites of such affidavit is expressly decided by the well known case of *Thomas* v. *People*, 14 Colo., 254, where, in a proceeding for constructive contempt, the court said:

"In the absence of the affidavit the court is without the legal information necessary to warrant the issuance of the attachment. The judge can not act upon mere hearsay statements. Knowledge must be brought home to him by the means prescribed by statute. The statement of facts upon which the court may proceed, must be verified by an oath. An information is not an affidavit, and can not be substituted for an affidavit unless it is duly verified. The report of the committee appointed in this case could by no means perform the office of the affidavit. So far as this proceeding is concerned, the appointment of the committee and its action were extra judicial. It may not be improper to initiate a proceeding to punish for a constructive contempt by information. The affidavit will still be necessary, however, unless the

information contains a statement of the facts and circumstances constituting the contempt. *In such case, the information simply performs the office of the affidavit prescribed by statute. As the affidavit must of necessity be sworn to, it is clear that the information must be verified. In the absence of verification, it is insufficient and confers no jurisdiction upon the court to issue the attachment.*"

As we have seen by several authorities, the statute referred to is declaratory of the common law, and at common law an affidavit is necessary, and hence the same rule applies to the information in this case.

With these observations as to the nature of the proceeding we will now examine the affidavit or information, whatever it may be, and we shall at this point treat of what appear to us to be material objections thereto, viz:

I. That such information is not properly verified, and

II. That such information does not state sufficient facts to give the court power or jurisdiction to entertain contempt proceedings.

THE INFORMATION IS NOT VERIFIED.

In treating of this subject we shall divide it into two heads:

First. That such information or bill is not verified, and

Second. That even if it were verified, such verification is insufficient.

The certificate of the verification reads as follows:

"Subscribed and sworn to before me, this 17th day of July, A. D. 1894. G. W. BURNHAM, *Clerk.*"

The point of our contention is that a clerk has no authority to take an affidavit. It will be noticed that there is nothing connected with the certificate of verification to identify G. W. Burnham as the clerk of the federal court, or of any court whatsoever, and that there is no seal of any court attached to the certificate or the verification.

In *Robinson* v. *Gregg*, 57 Fed. Rep., 187, it is said:

"The next objection is to the certificate of the verification [which is to an answer filed in the federal court]. It purports to be taken before the clerk of the United States Circuit court of the Eastern District of North Carolina, and is signed in the name of the clerk, by his deputy. *Grave doubts are entertained as to the power of the clerk of the Circuit court of the United States to administer oaths generally; that is to say, in matters wholly disconnected with their courts and the business thereof. No express authority can be found for it.*"

There is nothing in the statutes granting to such clerks any power to take affidavits or administer oaths generally; their powers are limited. The statutes of the United States specify the particular instances in which clerks of court may take oaths, and this case is not included in such specification. They also specify what persons may take affidavits, and clerks of courts are not included therein. These facts sustain us, we believe, in our view that the clerk is not authorized to take such certificate.

In *Haight* v. *Prop. of Morris Aqueduct*, 4 Wash. (C. C.), 601–606, Judge WASHINGTON said:

"I shall now proceed to consider the case which the answer presents, disregarding altogether the affidavits taken to support it, *as they were taken not before one of the judges of this court, or one of the commissioners*

appointed by this court to take affidavits, but by a person unauthorized by any act of Congress to perform this duty."

No presumption can be sustained that the clerk took this affidavit in the presence of the court, and by its direction. Such does not appear on the face of the affidavit, and such we believe was not the case. An affidavit in a proceeding of this kind should be strictly construed.

" The power of the court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, *except under the circumstances and in the manner prescribed by law. It is essential for the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceeding is authorized; for mere presumptions or intendments are not to be indulged in their support."*

Batchelder v. *Moore*, 42 Cal., 415.

State v. *Sweetland*, 54 N. W. (S. D.), 415.

Second. Even if it were verified, such verification would be insufficient.

The affidavit is as follows;

" Thomas E. Milchrist, being duly sworn, deposes and swears that he is the United States District Attorney for the Northern District of Illinois. That he has read the foregoing information and knows the contents thereof, and that the same is true in substance and in fact, as he verily believes."

This affidavit is insufficient. It does not set forth the fact that the affiant has witnessed the alleged acts of the defendants constituting the contempt, or that he *knows them to be true*, but simply that he *believes them to be true*. There is no excuse offered as to why such verification is not made on positive knowledge, and why it is simply made on the belief of the affiant.

In re Johnson, 3 Blatch., 148, the following language is used by the court:

"It is a cardinal principle in relation to the summary and imperative proceedings by the attachment, that that writ will not be granted unless a case of clear contempt be established. When the contempt is not committed *in facie curia*, it must be proved by affidavit from persons who witnessed it. 7 Daul. Dig., 307-8."

In *Ludden* v. *State*, 48 N. W. (Neb.), 63, Judge MAXWELL, said:

"A proceeding in contempt for acts not committed in the presence of the court, is instituted by filing an information under oath, stating the facts constituting the alleged contempt. *Gaudy* v. *State*, 13 Neb., 446; *People* v. *Nevins*, 1 Hill., 154; *People* v. *Wilson*, 64 Ill., 195; *Worlan* v. *State*, 82 Ind., 49; *Rex* v. *Beardmore*, 2 Burr., 792; *Cartwright's Case*, 114 Mass., 230; *Neal* v. *State*, 9 Ark., 259; *Bishop on Dir. & Forms*, Sec. 317. The charge must be direct that the party has committed the act complained of. In all matters based on the oath of a party charging another with the commission of an offense, by which he may be deprived of his liberty, the charge must be specific and direct; mere hearsay will not do. The affidavit in this case, therefore, is insufficient."

In the case of *State* v. *Blackwell*, 10 S. C., 35, heretofore cited, it was said that the statement of the matters charged under oath was necessary, as the penalties for false swearing were regarded as a safeguard to the liberties of the citizen.

In such a verification as the one under consideration, there could manifestly for all practical purposes be no punishment whatsoever for false swearing, inasmuch as the whole verification is based upon the party's belief, and such a verification as this would defeat the whole object of the affidavit, and would overthrow every safeguard to the liberty of the citizen.

In *Batchelder* v. *Moore*, 42 Cal., 413, it was said:

"If there be no affidavit presented, there is nothing to set the power of the court in motion, and if the affidavit as presented be one, which upon its face fails to state the substantive facts, which in a point of law do or might constitute a contempt on the part of the accused, the same result must follow, for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance in stating the facts constituting the alleged contempt."

Since such information or affidavit is jurisdictional, and since, as we have heretofore shown, such information is defective and equivalent to no information at all, in the light of the foregoing it would seem that no question could arise but that the whole proceeding is absolutely void.

THE INFORMATION DOES NOT STATE SUFFICIENT FACTS TO GIVE THE COURT POWER OR JURISDICTION TO ENTERTAIN CONTEMPT PROCEEDINGS.

There is nothing in the information which shows that a court of equity has jurisdiction to entertain these proceedings; since the information or affidavit is jurisdictional in its nature, and must set forth the facts which constitute the contempt in a clear and succinct manner, and state facts sufficient to give the court jurisdiction, it is manifest that unless the information shows on its face a cause of action against these defendants, that the whole proceedings are void, inasmuch as the federal court would be without jurisdiction to proceed.

In order to ascertain what was prohibited by the injunction order in this case, we submit the following brief propositions as covering the particular points covered by the injunction.

1. Enjoins any interference with inter-state business of the railroads.

2. With rolling stock, structures and other property of the roads.

3. From using force and persuasion, etc., to induce employes to neglect duty.

4. From using force, etc., to induce employes to leave service of the roads.

5. From using force, etc., to induce persons not to enter the service of the roads.

6. From doing any act in furtherance of a combination or conspiracy to interfere with interstate commerce on the roads.

7. From ordering, aiding, abetting, etc., any person to commit any of the above acts.

In accordance with the familiar rules of construction, the specific acts enjoined must control over the general orders; which virtually makes the injunction restrain against the commission of any of the acts set forth *by violent* or *unlawful means*. If it should be held that the injunction was broader than here interpreted, it is then insisted that the court had no lawful right to make such order and was wholly without jurisdiction in the premises.

Upon examination of the information for contempt we find that in substance it is as follows:

1st. It alleges the filing of the information and issuance of the writ of injunction.

2d. The service of the writ of injunction.

3d. It informs the court of the organization of local unions of the American Railway Union, and

alleges that the defendant, Debs, sent telegrams to the same, and incorporates them for the purpose of showing that defendants, notwithstanding the order of court and in direct and open violation thereof, ordered employes of certain foreign roads to leave the service of said railway companies in a body, and thereby hinder, delay and prevent said railway companies in the discharge of their duties to the public, and especially in the discharge of their duties in reference to the carriage of the mails and carriage of inter-state commerce.

4th. It alleges that Debs sent such telegrams after service of said writ with the approval of the other defendants; that in pursuance of said orders and directions many of the employes were induced to leave the service of said railway companies, and that the so-called railway strikes prevailed generally, hindering, delaying and preventing the transportation of United States mails and inter-state commerce for several days.

5th. It further alleges that as a direct *result* of such orders there was exercised upon some of said lines on the part of many of the strikers and ex-employes, intimidation and open violence; that employes refusing to strike or taking the place of strikers were driven from their posts by violence or threats. That the passage of trains carrying inter-state commerce and mails was prevented. That assaults were made on engines, cars and tracks. That there was a massing of mobs, burning of cars carrying inter-state commerce, wrecking of signal towers, etc., and that employes refusing to obey and remaining faithful to their posts were assaulted, arrested and confined.

6th. It alleges that defendants had full knowledge of prior violence of strikers, and that the orders were issued notwithstanding such knowledge, and knowledge that violence invariably follows all strikes.

7th. It alleges that said strikes were ordered to unlawfully and wrongfully establish a boycott against Pullman palace cars.

8th. It alleges that the defendants have full power to order strikes and boycotts, and to discontinue the same, as shown by letters and the action of the Pan Handle yard men.

9th. It sets forth the publication of an interview in the *Chicago Herald* and the allegation that it appears from the foregoing that they are in contempt, and that the defendant Debs threatens to form local unions and to order strikes, etc.

Such is the scope of the information, which, as heretofore stated, must set forth facts sufficient to constitute contempt, in order that the court may have jurisdiction to punish.

Counsel for the United States are to be congratulated upon their masterly effort to conceal the weakness of their information by the thick veil of irrelevant matter and prejudice which they have tried to throw over the point in issue. This is not a trial for conspiracy, nor are the defendants on trial for a crime, unless contempt constitutes a crime. They are not tried for the result of their actions, but for the acts themselves. The only question involved in this proceeding is whether the defendants are charged with disobedience of a lawful order of a court possessed of competent jurisdiction. If they are the court had jurisdiction to punish for contempt,

otherwise they should be discharged. They can be punished for the *fact* of disobedience and not the results of such disobedience, no matter how serious they may have been.

In the trial of the contempt cases growing out of a violation of an injunction somewhat similar in nature, in the case of *in re Phelan*, 62 Fed. Rep., 803, and on the trial of this case, *U. S.* v. *Debs*, 64 Fed. Rep., 724, the courts seem to take a truly remarkable view of what constitutes contempt. They do not dwell upon the acts themselves which constitute contempt, but they seek to punish the defendant for the result of such acts. We believe that such views are wholly without precedent, and entirely contrary to the very nature of a contempt proceeding.

Divesting the information of all of its melodramatic incidents of war, rapine and violence, by which counsel apparently seek to prejudice the court, we find that the only allegation of the information relevant and pertinent to the commission of contempt consists in the statement that, after the service of the injunction, defendant, Debs, with the approval of the other defendants, sent telegrams to officers or committees of local unions at the more important railway centers or cities, which telegrams ordered and directed employes of the railway companies named in said writ of injunction, which employes were members of the American Railway Union, to leave the services of said corporation in a body. The real charge is nothing more or less than this. It becomes most material, therefore, to examine said orders, and upon so doing it will be found that the strongest of such telegrams consists of a request to certain individuals to use their influence to call out men on certain roads in all departments, by persuasion alone, and in many instances

the recipients of such telegrams were cautioned to commit no violence.

This is all that the information charges. Stripped of its mantle, despoiled of its lion's skin, it simply charges what might be most briefly expresssed. The only questions for the court to determine are whether such orders constitute a violation of the injunction and whether courts have a right to enjoin such acts.

The only parts of the injunction which could possibly be construed as having been violated by the issuance of such telegrams are those parts where defendants and others were enjoined to desist and refrain from "compel- "ling or inducing or attempting to compel or induce by "threats, intimidation, persuasion, force or violence, any "of the employes of any of said railroads to refuse or fail "to perform any of their duties as employes of any of "said railroads, in connection with the inter-state busi- "ness or commerce of said railroads, or the carriage of "the United States mails by such railroads, or the trans- "portation of passengers or property between or among "the states." And "from ordering, directing, aiding, "assisting or abetting in any matter whatever any per- "son or persons to commit any or either of the acts "aforesaid."

It can not be contended that the information shows otherwise than that the defendants ordered or directed or requested certain persons to induce by persuasion other persons to leave their employment in a body. The question then hinges upon whether leaving employment in a body or, in other words, peaceably striking, is a right of employes. If it is, then to do so is no breach of duty, and is not to refuse or fail to perform any of their rights as employes, was not forbidden, and could not be forbidden by the court.

In *U. S. v. Kane*, 23 Fed. Rep., 749, Judge BREWER said:

"Moving on a little further to another matter, supposing Mr. Wheeler had two men employed, and that he finds that in the management of his little farm he is not making enough so that he can afford to employ two laborers, and he says to one of them: 'I will have to get along without your services, and I will do with the services of the other,' and the one leaves. That is all right. Supposing the one that leaves goes to the one who has not left, and says to him: 'Now look here, leave with me,' giving whatever reasons he sees fit; whatever reasons he can adduce, and the other one says, 'Well, I will leave;' and he leaves because his co-laborer has persuaded him to leave; has urged him to leave. That is all right; Mr. Wheeler has nothing to say. He may think that the reasons which the one that is leaving has given to the one that he would like to have stay, are frivolous, not such as ought to induce him to leave, but that is those gentlemen's business. If the one whom he would like to have stay is inclined to go because his friend has urged him, has persuaded him, has induced him to leave, Mr. Wheeler can say nothing. That is the right of both these men, the one to make suggestions, give reasons, and the other to listen to them and act upon them."

This is the undoubted law and the reasons which were given by the courts in the case of *In re Phelan*, 62 Fed. Rep., 602, that because the object of the strike was to boycott the Pullman Palace Car Company the strike was unlawful was, in the light of the foregoing, utterly contrary to law. The defendants, as declared by Judge Brewer, had a right to persuade employes to leave, and such employes had an undoubted right to leave as long as such persuasion was unaccompanied by force, violence, threats or intimidation. As long as it was only persuasion such action was lawful, regardless of what reasons were assigned, and of the fact that it was alleged

that the interests of the Pullman Palace Car Company were hostile to labor. It was the right of the defendants to make suggestions and give reasons, no matter how frivolous such reasons might have been, and it was the right of the other employes to listen to them and act upon them. Surely the Pullman Palace Car Company was competent to take care of itself.

In the case of *In re Doolittle*, 23 Fed. Rep., 547, Judge BREWER again said:

"It is not the mere stopping of work themselves, but it is preventing the owners of the road from managing their own engines and running their own cars, that is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons' working and preventing the owners of railroad trains from managing those trains as they see fit, there is where the wrong comes in."

In *Arthur* v. *Oaks*, 63 Fed. Rep., 327, it is said:

"We are not prepared in the absence of evidence to hold as a matter of law that a combination among employes having for its object their orderly withdrawal in large numbers or in a body from the service of their employers on account simply of a reduction in their wages is not a strike within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal."

In *Rogers* v. *Evarts*, 17 N. Y. Sup., 206, the court said:

"The tendency of modern thought and judicial decisions is to the enlargement of the right of combination, whether of capital or labor. All restrictions may not be removed, but I am not willing to hold that the combination which appears in this case in itself, and apart from the methods used, is within the condemnation of the law as it is now interpreted in our courts. Irrespective of any statute, I think the law now permits workmen, at least within a limited territory, to combine together, and

by peaceable means to seek any legitimate advantage in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join the combination. This right to persuade co-laborers involves the right to persuade new employes to join the combination. This is but a corollary of the right to combine."

In *People* v. *Kostka*, 4 N. Y. Crim. Rep., 429, the court said that workmen might co-operate to improve their condition, and to increase their wages, and that they might refuse to work for less than the price they have jointly fixed, and that "they may do everything that is lawful and peaceable to secure that price. They may even go to their brethren and beseech them not to work for less than the agreed rate. They may use all lawful arguments to prevent acceptance of less than the agreed standard of wages. All this they may lawfully do. "Argument, reasoning and entreaty are lawful weapons, "but the moment they go beyond these means and "threaten to punish him whom they believe to be their "erring brother, threaten him with violence should he "stand in the way of their success by accepting a lower "rate than that fixed by the co-operators, they bring "themselves face to face with the law. Up to the point "of threat or violence they may do what they please, and "public opinion says, 'Heaven speed you.'"

In *Murdock* v. *Walker*, 25 A. (Pa.), 1893, 492, it was said:

"The right of workingmen to organize in associations can not be questioned, and the right of the members of such associations, either as individuals or as an organization, to cease work for any employer, and to use all lawful means to induce others to refuse to work for such employer, are equally well founded."

In *People* v. *Wilzig*, 4 N. Y. Crim. Law Rep., 413, the court in instructing the jury said:

"They have a right to go to all their friends, make known their wrongs, and say to them, 'If you are a friend of labor, withdraw your patronage from the man who injures us or refuses us justice.' There is no law against that."

In a case which arose in New York City, reported in Vol. 18 of the Central Law Journal, page 200, the court in charging the jury laid down the law that the employe had the legal right to decline to work for his employer, unless the latter consented to pay wages formally demanded. That he had the right to invite others to join him in the course he had determined to pursue; to accost workmen in the street, or elsewhere, and invite them to follow his example or join the union.

In *Reynolds* v. *Everett*, 39 N. E. (N. Y.), 72, a case decided on January 11, 1895, which was a case where an action was brought to obtain an injunction against defendants, by virtue of concessions of counsel, the case came to trial upon the sole issue of the right of defendants to induce persons by persuasion and entreaty to leave the service of their employers or not to enter the service of the plaintiffs, and other cigar manufacturers. The question was decided in the affirmative, the trial justice holding in substance that when the peaceable methods of entreaty and persuasion were adopted, and no resort was had to intimidation, there was no obstruction of plaintiff's rights, and directing a judgment for the defendants dismissed the complaint. At a general term of the Supreme court such judgment was affirmed, and upon appeal to the Court of Appeals of New York, Judge GRAY, in affirming the judgment of both of the lower courts, said in a portion of his opinion:

"The plaintiffs could not be said to have been refused any protection required by the facts of the case. The mere apprehension of some future acts of a wrongful nature, which might be injurious to the plaintiffs, was not a sufficient basis for insisting that the preventive remedy of a final injunction. Such a remedy becomes a necessity only when it is perfectly clear upon the facts that, unless granted, the complainant may be irreparably injured, and that he can have no remedy at law for the mischief occasioned. How can it be asserted that there was any such necessity? There were absent the elements of intimidation, or, as the trial judge observed, of such circumstances surrounding the acts of persuasion and entreaty as would characterize them as intimidation."

It is lawful for workmen to endeavor by a reasonable argument and persuasion to induce others, who have not heretofore acted with them, to do so, but it is unlawful for them by threats, intimidation, molestation, or by any form of coercion or compulsion, to interfere with the exercise of the free will of such other workmen.

Perkins v. *Rogg*, 28 Weekly Law Bulletin, 32.

In the case of *Richter* v. *The Journeyman Tailors and others*, 2d Ohio Cases, reported in the Weekly Law Bulletin, Vol. 24, 189, it was alleged that the defendant sought to break up the business of the plaintiffs, and that to accomplish said purpose they maliciously compelled the employes of the plaintiff to cease working for them. The court in considering that phase of the case touched upon the right of employes to persuade others to join them. The language of the court is as follows: "The "defendants may lawfully persuade the workmen of the "plaintiffs to abandon the employment in which they "were engaged, as long as they use only argument or "reason."

The early English cases, which are greatly relied upon by those who seek to contend that a mere combination of workmen, without any acts of force or violence, are unlawful, treated the abandonment of service by workmen, by a preconcerted arrangement, as criminal conspiracy, regardless of the reasons for such abandonment. This fact is, however, explained by an extract from the opinion of Judge DALY in the case of the *Master Stevedores* v. *Walsh*, 2d Daly, 19, relative to the right of combination by workmen, which extract is as follows:

"The absence of any adjudication upon this question of the common law, may be attributable to the fact that there were statutes in England from the passage of the Laborers' Act, in the reign of Edward III, down to the reign of George IV, regulating the rate of wages, and forbidding agreements or combinations to evade these statutes. Laws made in the interest of employes, in the creation of which those who are most affected by them had no share."

In the same case Judge DALY also used the following language:

"These early English statutes regulating the price of labor, being wholly inapplicable to us in our colonial condition, were never in force in this country and formed no part of the laws of the colony of New York at the adoption of our state constitution, in 1787. This decision, therefore, was limited to England [referring to the case of *King* v. *The Journeymen Tailors of Cambridge*, 8 Mod., 11], deriving its whole effect from the English statutes, the provisions of which it was held that the defendants had conspired to defeat."

These early English statutes, some of which were passed in 1349 and 1350, have been repealed. They were the relics of the old feudal system.

To indicate the present law in England on this subject, and the justice which the English people have

seen fit to render to the workingman, we shall cite a few cases.

In *Regina* v. *Selby*, 5 Cox, C. C., 495 (note) which was a criminal case under the act of 6th George IV, Chapter 129, where the pickets of the strikers pursued such a system of annoyance, by watching and interfering with the workmen, that such workmen were compelled to abandon the work, the court held, that under the statute picketing was not unlawful unless accompanied by violence to the person or property or by threats, intimidation or molestation.

In *Regina* v. *Druitt*, 10 Cox, C. C., 593, it was held that mere picketing, if so done as not to excite reasonable alarm, or not to coerce, was no offense at law. That it was lawful to endeavor to persuade, but that if the pickets indulged in abusive language and alarming gestures, it was otherwise.

In Vol. 24 of the Am. & Eng. Enc. of Law, 124, we find the following:

"In the United States, the doctrine announced by the earlier cases tended strongly toward this view of the law (referring to the early English cases), but of late years the doctrine has been modified and softened and it is conceded that workmen or employes possess the right to quit work singly or in a body by a preconcerted agreement, provided only that they do not interfere with the rights of others, whether co-employes, employers or the public. They have a right to seek an increase of wages by all peaceable means and meetings and combinations to that end, if unaccompanied by threats, violence, disorder, or attempts to coerce unlawfully. They may agree in a body that they will not work below certain rates and a strike to this end, if unaccompanied by any of the foregoing elements, is not an offense."

Sinsheimer v. *United States Garment Workers*, 28 N. Y. S., 321, is a very well considered case and fully sus-

tains the position here contended for; and the right of the working men to persuade others not to deal with the employer is upheld. It was there held that a trade union against whose members plaintiff discriminated in employing labor would not be enjoined from sending circulars to plaintiff's customers to induce them to withdraw their custom from plaintiff. The court said: "The defend-"ants notified persons engaged in the trade of the con-"troversies which were existing, and virtually requested "such persons not to deal with the plaintiff's firm unless "such differences should be adjusted. I fail to see that "there is any infringement of any provision of law in the "issuance of such a circular."

The Law—Labor Organizations and the Industrial Situation.

It is true that some judges overlooking the history of labor organizations and labor struggles and the history of the decisions of courts, have failed to distinguish between the earlier laws that once restricted and confined the working people, and the more humane and enlightened decisions of later days. At times also courts have viewed only the consequences that frequently result from great strikes, and in view of these consequences have declared acts unlawful when such consequences might reasonably follow in their train. It is believed, however, that neither by logic nor authority can any such system of reasoning be supported; that it is neither wise nor humane to say that an act is unlawful simply because dangerous results may follow as incident to the act.

This whole information plainly shows that since the

granting of the injunction not one act was committed by these defendants, or any of them, that was in any way unlawful, or that could be forbidden by the court if working men are to have the right to organize and the right to strike. The whole information is a cunning device to cover up the weakness that is inherent, and will be manifest upon close scrutiny. Not one single affirmative act is stated, not one single command is shown whereby any one of these parties ever urged the violation of the law, a breach of the peace, or a commission of any act that could be rightfully forbidden by the courts; not one single word or act is charged but such as every free man should have the right to say and do.

It is simply sought to charge these men with violating an injunction, because some one was guilty of unlawful conduct, and upon the allegation that this unlawful conduct followed on these defendants committing a lawful act.

It is charged that these men ordered a strike, but over and over again the courts have declared that a strike is lawful. It is charged that in pursuance of the orders of a strike, a great number of telegrams were sent out to various sections of the country, directing and ordering men to join the strike. Telegrams sent before the injunction and after are recited together in the information, but not one telegram can be cited that in any way could fall within the inhibition of the injunction, or that the court could have the power and jurisdiction to forbid. In the whole list of telegrams there is but one that could be tortured into any instruction or counsel to do an unlawful act, and this is the telegram dated Chicago, July 2, 1894, and sent to Courthead, South Butte, Montana, which is evidently and plainly meant without any inten-

tion of violence, but as a playful statement or a joke. It would be doing violence to reason and common sense to say that this telegram was meant to incite violence, or urge the commission of any unlawful act. This telegram is inserted in this information, although plainly harmless and although sent two days before the injunction was served, and one day before it was published by the press.

The information charges that as a result of the order for a strike, certain violent and unlawful acts were committed at various places after the order was issued. It does not state a single fact to show that any man officially connected with this union, or any man deprived of his liberty by the order of court was connected with one of these unlawful acts, or did more than to counsel, advise or order this strike. To say that such acts as are directly charged to these parties would give a court of chancery the power to enjoin, would be to leave a labor organization entirely helpless to resist a cut of wages, or to aid their fellow workmen by ordering a strike.

As a further excuse for charging these men with a violation of the injunction order, it is alleged that what was done was done in furtherance of a boycott, and, therefore, was a proper subject for the injunction of a court. The word "boycott" has been variously applied. It has sometimes been applied to acts which can not properly be specified as boycotts, and sometimes those acts which are boycotts are designated as something else. If the American Railway Union had not the right to strike for the grievances set up by the bill of complaint, and which in this particular must perhaps be referred to in order to show what is meant by the word "boycott" in the in-

formation, then any strike of more than a single individual is enjoinable by the courts.

It is charged in the bill that the employes of the Pullman Company were engaged in a strike against their employers. The bill does not allege whether this strike was just or unjust. It simply shows that in May, 1894, some difference between the Pullman Palace Car Company and its employes arose, and that growing out of said differences, a considerable portion of the employes left the service of the company; that the Pullman Palace Car Company failing to adjust the differences with their employes, the American Railway Union determined that they would refuse longer to handle the Pullman cars. The American Railway Union, as shown in this bill, is a body of men composed of employes in all departments of the railway service. They are banded together, like every other labor organization, for mutual protection and benefit. The bill charges what is undoubtedly the fact, that this organization has the right to engage in strikes, and no doubt the strike was one of the means by which the members of this organization believed they could better the condition of themselves and their fellow workers. If these various railroad employes representing thousands of men engaged in all classes of railway service, believed that it was for their mutual advantage to form an organization that they might act together to a common end, that for the purpose of increasing wages, preventing a reduction of wages, or aiding their fellow laborers in like struggles, they could readily and easily unite and strike, they plainly had the right under the law and under the inalienable liberties of free men to form themselves into an organization of this kind. If this body of men forming

themselves into one organization, believed it was to their best interests and those of their fellow workmen, or any others, that they should refuse to haul certain cars, and if they preferred to relinquish their employment rather than haul such cars, they certainly had the right to refuse to perform that service, or else they were not free. The employes of the Pullman Palace Car Company were working men like themselves. True, they were engaged in a different line of railway service but it was a line of service directly connected with their own. They doubtless believed that their fellow laborers were unjustly treated, and did not desire to handle the cars of a corporation that was unjustly treating their brothers who were then engaged in a struggle with this company.

Under the allegations of this bill and information it simply appears that the American Railway Union recognizing the difficulty between the Pullman Palace Car Company and its employes, served notice that unless the Pullman Palace Car Company should settle their difficulties with their employes, they would refuse longer to haul their cars. If a man engaged for service with a farmer should decline to perform a certain service, for instance, to work in the hay field, he would certainly have the right to refuse to perform this service, and if this service were required by the master, would have the right to cease his employment, and no court of chancery would have the power to enjoin him from leaving the service of his master if he saw fit to leave on account of the duty required.

If for the reason that certain car manufacturers were treating their workmen unjustly, they refused to handle the cars of such company, and if their employers demanded that they should handle such cars, they would have the

right to cease to handle them, or to quit the service if the employer demanded this labor which they did not desire to perform. It is not for the employer, and it is not for the court to say whether their reason for working or not working is good or bad. So long as they simply desire to quit the service, whether for good cause or for bad, the reason must be left to the individual judgment of the men, and if courts seek to prevent the exercise of that individual judgment, they are then by their orders holding the employes in involuntary servitude, contrary to the principles of liberty and the direct provisions of the constitution.

Whether the cause for striking grew out of a direct injury to the railway employes, or what is known as a sympathetic strike, is a matter that can not affect the legality or the illegality of the act. If no man could strike except he were personally aggrieved, there could be no strike of a combination of working men. Under modern industrial conditions, where hundreds of men are working together to a common purpose, and where the business of the country is intertwined more or less directly, a strike would be impossible unless those who are not directly and personally aggrieved, have the right to cease labor for the benefit of their fellows. The theory on which all labor organizations are based is that workingmen have a common interest, and that "an injury to one is the con-"cern of all." They are organizations whose principle and whose purpose is to help redress the grievances of each other, and to aid one another in establishing better conditions and fairer relations. If it should be said that if one man should suffer a special grievance, the others could not unite to redress it, then to what purpose can an organization of laboring men exist? If it could be

said that a railroad company might arbitrarily discharge all of its engineers, and that the firemen for this reason could not strike, then any general organization of railroad men would be of no avail. If it is said that the switchmen and the conductors, the section men and the brakemen have no common cause and can not aid each other, then all organizations of workingmen are a worthless, useless mockery. The logic of any such position followed to its end would prevent any one working man refusing to give his service because of the grievances of another working man, and would leave each individual worker completely isolated and unaided to fight his battle alone against the combined capital everywhere vigilant and aggressive, to add to its own profit by reducing the wages and condition of those who work.

If it shall be admitted that any one working man has the right to combine with any other working man, and following that combination to cease to labor for the benefit of the other, then it must be admitted that any organization of workingmen, or any number of workingmen have the right to cease to labor because they believe any other workingman, or any other organization of workingmen is not fairly treated by their employers. If the courts by any interpretation of the law should prevent this right, and hold that no men, or no body of men could strike except they were personally interested, they would deal a death blow to all labor organizations, and resolve all the assemblies and unions of workingmen into individual units to combat singly with great combinations against whom they would be utterly powerless to cope.

It is believed that in America, as well as in England, labor unions are so firmly established that no such blow against organization will be dealt by the court. Intelli-

gent employers, who have any regard for the interests of their workingmen, and who have any regard for the well-being of their country, have long since found it best to treat with labor organizations. They have long since regarded them as useful instruments in industrial and social life. To deprive them of the power to cease working as a body for any cause which to them shall seem sufficient, would be to declare unlawful that which for nearly half a century in England and America has been considered lawful, and also believed by all wise students and historians to have done more for the elevation of the working people, and through them of the great mass of both nations, than any other agency in social life.

True it is that here and there some modern judge, failing to view the broad principle as it exists, failing to understand the beneficence of these organizations of workingmen, have pronounced whole masses of men as conspirators, and all strikes and practically all organizations as crimes. One of the most startling statements of this kind is to be found in the case of *Arthur* v. *Oakes*, and in the language used by Judge JENKINS, which reads as follows:

"It is idle to talk of a peaceful strike. None such ever occurred. The suggestion is an impeachment of intelligence. All combinations to interfere with perfect freedom in the proper management of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic, or with the lawful employment of others, are within the condemnation of the law. It has been well said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the

cessation of labor by the conspirators, but by the necessary prevention of labor by those who are willing to assume their places, and as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so by intimidation and by the compulsion of force, to accomplish the end designed."

It would probably be impossible to find a stronger statement pronounced by any judge against the right to strike and the liberties of workingmen than this. It is believed that no respectable authority within the last fifty years can be found to sustain the doctrine here enunciated. Happily for workingmen and for the country, this doctrine was expressly disaffirmed and overruled by the opinion of Justice Harlan, sitting in the Circuit Court of Appeals for the Seventh circuit, and reported in the 63d Federal Reporter, page 310, in the case of *Arthur* v. *Oakes*. In this opinion Justice HARLAN used the following language:

"But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another. An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called, or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in the condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction." * * *

"The rule, we think, is without exception that equity will not compel the actual affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for services of that character. The right of an em-

ploye engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one place or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal service." * * *

"In the absence of legislation to the contrary, the right of one in the service of a *quasi* public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employe from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers against their will to keep a particular employe in their service." * * *

"The fact that employes of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employes, against their will, to remain in the personal service of their employers." * * *

"We have said that, if employes were unwilling to remain in the service of the receivers for the compensation prescribed for them by the revised schedules, it was the right of each one on that account to withdraw from such service. It was equally their right, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body from the service of the receivers because of the proposed change." * * *

"These employes having taken service first with the company and afterward with the receivers, under a gen-

eral contract of employment, which did not limit the exercise of the right to quit the service, their peaceful co-operation as the result of friendly argument, persuasion or conferences among themselves, in ascertaining the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public." * * *

Such a loss under the circumstances stated, would be incidental to the situation and could not be attributed to employes exercising lawful rights in orderly ways, or to the receivers, when in good faith and in fidelity to their trust they declared a reduction of wages, and thereby caused dissatisfaction among employes and their withdrawal from service."

And again expressly referring to the language of Judge JENKINS quoted above, the court says:

"We are not prepared, in the absence of evidence, to hold as matter of law that a combination among employes having for its object their orderly withdrawal in large numbers or in a body from the service of their employers on account simply of a reduction in wages, is not a 'strike' within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal."

In this case it was expressly held that no injunction could lie except against the commission of such acts as were essentially violent and unlawful. Viewed in the light of this decision, it would seem impossible to point to a single line in this information that is contrary to the law, or which any man or body of men had not a perfect right to do.

It will not do in any given case to say that an act may be restrained because it will produce injury to some one else; that an injunction would lie to prevent a strike be-

cause a strike would injure the property of a railroad company or inconvenience the public who use the road. It is many times impossible to benefit yourself except by injuring some one else. In every case where the employe attempts to receive higher wages he injures his employer because he takes from him a certain amount of money which otherwise he could appropriate himself. In every case where an employer reduces the wages of his servants he injures them by taking from them an amount of money which they otherwise would have. In every case where the employes cease working for the sake of a raise of wages or maintaining their old rate, they injure their employer, but this injury is the only means by which the workingman can help himself, and is, therefore, not such an injury as will authorize the courts to interfere. In our present industrial and social life there is no complete ideal harmony among the various units which make up society as a whole. No doubt the world would be far better and far happier if men could so adjust their conduct that complete harmony would result so that the good of each individual should be likewise the good of all the rest. But in a life based largely upon selfishness, and a mean and narrow selfishness at that, life is largely a struggle to each person, and in this combat each amasses by what he gets and keeps from some one else. The manufacturer is interested in injuring his employes by paying them the smallest wages that the market will allow. He is interested in despoiling his customer by charging him all that the course of trade and custom will permit. The common carrier by means of system and organization, by means of combination and association, is interested in charging the highest rates that he can

possibly obtain to the detriment both of the manufacturer and the consumer of the goods, to the farmer on the prairie and to the manufacturer in the town. Likewise he is directly interested in injuring his employe by paying him the smallest wages that the hard conditions of his competitive existence compels him to accept. The merchant induces the manufacturer and the jobber to sell at the lowest prices by offering him his money in exchange for goods, or trading where he can to the best advantage to himself, and he turns to his customer and receives from him the highest possible price that his wit and ingenuity can devise a way to take. Each one is profiting directly, not by helping some one else, but by seeking an advantage of his fellow, but it can not be said for this that his conduct is unlawful or that courts will restrain his acts. It is impossible in the present competitive system of industry and of life that any one should seek his own best good without in some way conspiring to harm or injure his fellow man.

True, this organization might have known full well that their benefit, and the benefit of their fellow-workers at Pullman, could only be obtained by lessening the dividends of the corporations whom they served, and by temporarily inconveniencing the public, who were bound to depend both upon the corporations and the employes operating the various lines of road. But this injury was not inflicted wilfully or maliciously because they desired to harm their fellows, but was inflicted for the purpose of bettering the condition of their fellow workingmen, and giving greater opportunity and more comforts to those engaged in toil.

Neither will it do to say, as charged in this information, that the complainants were aware that violence

usually followed strikes. The telegrams set out in this information show that in no way did they counsel violence, but, on the contrary, often exhorted their followers to keep the peace and preserve the law. If men could not do lawful acts because violence might possibly or reasonably result, then the most innocent deeds might be crimes. To make men responsible for the remote consequences of their acts would be to destroy individual liberty and make men slaves. No one can tell either the cause or the consequences of an act. Each act is in turn connected with every one that goes before and every one that comes after. Men can only be made responsible for their acts and their direct and immediate and necessary consequences. To do more than this would involve every act of man in uncertainty and doubt.

This information does not say that these men committed violence, but that they did certain lawful acts, and that violence resulted from those lawful acts. The same can be said of any body of men who build a railroad or a steamship or a factory or mill. Violence might have resulted which would not have occurred excepting for a general strike. A general strike no doubt occurred, which would not have happened except for the injustice and oppression of those intrusted with great amounts of capital, who should use it for good means, as well as purely personal ends.

The relation in this information and bill of many circumstances and details of violence and crime, certainly can have no bearing on this case. In the light of the law and in the light of truth it can not be said that this extraordinary power of the court which is invoked to prevent men from combining and striking is in any way necessary to conserve the peace,

An injunction was never intended to prevent a mob or to disband a crowd. It was never meant to prevent arson, riot or murder. It was never intended to do this, and it never can do this, and any argument that this power of the court is necessary for such purposes, can only be meant to conceal the inherent weakness of resorting to any such means in a case like this. The police power of the state is amply sufficient to prevent riot, arson, insurrection and murder. If it were not amply sufficient the power of the courts would be utterly impotent to aid or to assist. There is no power or resource at the command of the courts which in any conceivable case could be greater than the power in the command of the various cities, states and federal government. It is not as prompt, it could not be as effective, and it was not as effective in this case and could not be in any other. The law has provided a plain, certain and prompt method for dealing with all acts of violence and crime. This method was open to all the authorities in the case at bar, and no injunction of any court either aided in preserving the peace or in preventing a single act of violence or crime. The police power of the city, the police power of the state, and if these were insufficient the whole power of the federal government were at the command of the authorities, and ready at any moment to preserve order and command obedience to the law. All of these resources could not be at the command of the federal court. It was impossible for the federal court to act as promptly, as thoroughly and as efficiently as the executive branch of the government, and any attempt to make the federal court take the place of the executive is an attempt to force one co-ordinant branch of the government to invade that of the other, and can only result in great harm to both.

Every allegation in this information that charges any unlawful acts, any acts of violence and crime, and every argument used by which the power of the court is sought for the purpose of preventing these acts or crimes, are the very best arguments that could possibly be adduced to show that this whole case is outside the chancery power of the court, and that all such facts and circumstances should be left to be promptly dealt with by the police power of the government that is responsible for the preservation of the peace and the maintenance of the law.

In the consideration of cases presented by the counsel for the government this court will, we believe, consider the times, circumstances and conditions under which such opinions were announced.

It is not only in the light of the past that any true principle can be enunciated by this court. An opinion that will result in such vast and sweeping consequences to organized labor, the relations between capital and labor, the social problems of the future, and the industrial evolution through which America, together with all the world is now passing, must be one which considers not only the past, but the present and future as well. The decisions of all other courts must be viewed in the light of the conditions from which they sprung. In considering them the court must also consider the ancient social position of the workingmen, the old industrial methods now passing away, the great industrial changes that have come to the present, the new social adjustment and harmonies which grow out of the vexed problems of to-day.

It is often charged that judges and lawyers are too

strictly bound to the past, and that they do not give sufficent attention to the new questions and new adjustments that constantly arise in a changing time. The whole industrial world has been made over in the last fifty years. It has practically been made anew in the last quarter of a century. And rules and regulations which concerned the interest and welfare of the small communities of the middle ages, with their isolated farms, their small shops and mills and their primitive tools can not equally conserve the changed industrial conditions of today. Those rules and regulations that once prevailed might even exist up to the last quarter of a century, but since man learned to use the forces of nature, and invented cunning machinery to do his work, all industrial conditions, all methods of production and distribution, the whole relation of employer and employed, has been completely changed.

Not only is it to be remembered that the application of steam and electricity to all the industrial affairs of the world has changed social conditions, but the position and status of the working men in the eye of the law and in the eye of humanity, has changed as well. Originally the workingman was a slave, absolutely and literally.

His social status in the ancient civilizations of Greece and Rome was that of a serf. He had no rights of citizenship, no concern in the government. He was allowed to live only to work and produce for some one else. He had no rights which the privileged class were bound to respect, he existed to make their lot happier, and for nothing else.

As said by Sampson in his remarkable argument in the case of Journeymen Cordwainers of the City of New York in 1809, Yates Select Cases, in speaking of the workingmen:

"Throughout the habitable world luxury, vanity, and even fancy, is satiated by the productions of their industry; but like the worm that spins its bowels and perishes in the act, so they, whose hands impart to the tissues its luster and its hue, to flatter the voluptuous and the gay, pine themselves and decay in obscurity and want. And a late tourist has too justly remarked that from poverty and pain the workmen in certain manufacturing towns in England exhibit the strange phenomenon of green hair and red eyes."

In England he was bought and sold, treated like other chattels, and had no rights. Even down to the seventeenth century he was still virtually a slave. He was forbidden by law to leave the county without the consent of the authorities. He was forbidden then to stay a longer time than was specified by their permission. He was forbidden to receive more than a certain price for his services, and was made a criminal if he received and worked for a greater sum than stipulated by the law. His clothing, his food, his social relations were regulated by the law for the purpose of keeping him in the status to which his master saw fit to place him. And not only would not the law let him help himself, but it prevented others from helping him. In the time of 5 George 1, 23 George 2, and 14 George 3, statutes were passed inflicting fines, imprisonments, pillories, and ear slitting upon such as encouraged any artisans to seek a better lot. For this they called "seducing artisans."

A long series of harsh, unjust and barbarous decisions of courts served to forge the fetters still more securely upon him. To meet and discuss his grievances with his fellowmen was conspiracy. To form a labor organization of any kind was a crime. To agree with two or three more of his class as to hours and service, and rate of wages was a felony. It was presumed that work-

ingmen could not meet for discussion without plotting treason to the state, or treason to their masters. The early trade unions were all conspiracies, and the early organizers of these unions, to whom all the world is indebted, were criminals and outlaws. They met at night, in forest and mountain. They hid their records and archives in the earth. They were pursued, captured and imprisoned for the crime of seeking to get a larger share of the product of their labor.

History of Trades Unionism in England by Sidney and Beatrice Webb.

It was out of the unjust and degraded status of the workingmen, out of these barbarous enactments of parliament and decisions of judges, and out of the social and industrial conditions of the middle ages, that later laws and regulations have sprung. Politically and theorically the laborer is now a freeman, the equal of the employer, the equal of the lawyer or the judge. But freedom does not consist alone in political rights, or in theories of government, or in theories as to man's relations and the state. Under the present system of industry hundreds and thousands of men must work for single employers. So long as steam and electricity are applied to machines in any such manner as at present this must be the rule. To operate a rolling mill, a railroad, a shoe factory, a cotton mill, or any industrial institution, requires great masses of men working together to a common end, and subject to regulations from a common head.

In the evolution of industry vast capital is necessarily accumulated under the control of a single head and directed to a single purpose. This capital is thoroughly

organized to serve the interests of its owners. Not only is the capital in each particular plant or industry organized, but various plants and industries are organized together for the purpose of uniform methods for the transaction of their business for the greater advantage of the organizers of these industries.

The rate of wages, like that of products, is governed by the great law of supply and demand. This supply and demand means the supply and demand of labor. The great manufacturers, the great refiners, the great distillers, and brewers are able to regulate the price of their commodities by limiting the supply and thus relatively increasing the demand. In the employment of labor governed by the rules of business, the market treats labor as a commodity, a commodity like any other regulated by supply and demand. Under this rule of business which prevails, and perhaps must prevail unless the present industrial system is some way modified, the employer purchases the commodity of labor at the lowest wages for which the workman's service can be obtained.

The great business princes, organizing and systemizing their affairs, agreeing with each other, and working to a common end, are able to fix a uniform rate at which workmen will be employed. If the supply of workingmen is limited and the demand is great, then wages will be relatively high. If the demend for labor is limited, and the supply relatively large then wages must be low.

With a constant tendency in their business to replace men with machines, to replace skilled labor with unskilled, to replace men with women, and women with children, for women and children can feed machines as well as men, the tendency must constantly be to limit

the demand for labor and increase its supply. The old political economists were wont to teach that where labor is displaced by machinery, the energies of the unemployed could be turned in some other direction. But the facts of life and business show that this theory can not prevail under the conditions of the present. With machinery displacing labor in every line of industrial activity the supply of labor is constantly gaining over the demand.

Under an ideal state, where all machines and implements of production would be operated for the purpose of feeding, clothing and otherwise serving man, each new machine might add to the wages of labor, but under the law of business where all enterprises are owned and controlled by individuals and corporations, and operated for profit, the displacement of labor under the law of supply and demand enables the operator to obtain services at a constantly lessening rate.

Under the industrial conditions of both the past and the present there has never been but one way for the workingman to increase or even maintain his wages. And that way has ever been to refuse to work except upon such terms as he thought fit to demand. Under the old system of industry, where one or two or a few men were employed by a master, the laborer could individually refuse to work unless the master saw fit to pay the wages he desired. The refusal to work has been the only way that the laborer has thus far found to regulate the supply of the commodity that he has to sell, and without controlling the supply, there is no way under the conditions of the present, to regulate the price. With the change of industrial institutions, with the introduction of the factory, the railroad and the great

farm, in short with the organization and combination of capital, the laborer has been obliged, for self preservation, to form counter organizations and combinations of his own. As in the olden times, the only way that he could increase his wages or maintain the ones he then received, was to refuse to work, and with capital organized, the only refusal to work that could possibly prevail was the refusal by such combined organizations of working men as would limit the supply of labor, and thus relatively increase the demand.

The refusal of one man to work in a factory, where thousands are employed, the refusal of one railroad employe, or numbers of the employes on one steam railroad would, under modern industrial conditions, be wholly ineffectual to control the supply of labor, and thus increase the price.

Much has been written about the harmony existing between capital and labor, and much has been said to show that in reality these two are in sympathy, and that no conflict exists between them. But in actual life we know that these statements are not true. The old political economists understood the relations of capital and labor and laid down the principle that it was the business of the employer to pay as little as possible, and of the employed to demand as much as possible. They understood, as did the business men, that the more money paid for labor the less can be divided in profits; and the less that is paid for labor the greater is the reward of capital.

No one would question the right of a great mill or railroad or a combination of mills and railroads to discharge their employes singly or collectively at will. No one would question their right to cut wages whenever or

however they saw fit. It is a right they have long enjoyed and often used, and it would be difficult to find where courts have ever been asked to interfere with this privilege.

Equally any number of men have the right to raise their wages and limit their commodity by refusing individually and collectively to serve their employers except upon such terms as they see fit to impose. To say that the employers are inconvenienced or injured, or that the public is inconvenienced or injured is no sufficient reason for denying them the right that belongs, or should belong, to every free man to give or withhold his services as he sees fit.

To say that working men may organize and still have no power to avail themselves of the purposes of organization is a mockery and a cheat. If they have the right to organization they must have the right to act together else the purpose of organization will be destroyed. If working men may organize for their self protection, and if they believe that this self protection is served by leaving their employment, they must have this right or orgaization is of no avail. The right to work, or not to work, implies the right to choose your own cause for working or not working. The cause may be good or bad. It is an incident of freedom to be allowed to determine that cause for yourself. And if one person may work or not work according to any cause or whim he sees fit to entertain, likewise a body of men may work or not work for any cause that may seem best to them. If their cause is first to be subject to the approval of the courts they are not free.

If men have the right to cease working, or to strike, it must also be held that they have the right to advise

others to cease to work or strike as well. If they have a right to strike for their own grievances they have the right to strike for all their fellow workmen. The very object of combination and association is mutual aid. An organization of laboring men is necessarily an organization where each person binds himself to help his fellow workmen, that the good of all may be best conserved. Unless one workman may assist his fellow workmen the whole use and purpose of trade unions and labor organizations will be destroyed.

It is difficult to understand how either in law or morals it can be claimed that one has the right to strike for the redress of his own grievance and not the right to strike for the redress of the wrongs of his fellow workmen. No doubt it is difficult for some people to understand a motive sufficiently high to cause men to lay down their employment not to serve themselves but to help some one else. But until this is understood, the teachings of religionists and moralists will have been in vain.

If it is lawful for men to organize, and in accordance with the organization to cease to labor, they can not be regarded as criminals because violence, bloodshed or crime follows such a general strike. Mankind in his progress from the lower order still retains many instincts of the brute, and at times of great public excitement, or in the presence of great emergencies, these brute instincts are ever liable to control. It has been sometimes held by courts that every strike is attended with violence and bloodshed, and that, therefore, no men have the right collectively to cease work. While, in the light of history, if it were conceded that violence generally followed strikes, it would by no means follow that a great body of men would not have the right to lay

down the tools and implements of their trade to better the conditions of themselves and their fellow-men, although growing out of this violence, bloodshed and crime would surely come.

As violence and bloodshed frequently follow strikes, so do they frequently follow lockouts and reductions of wages, but these facts are not sufficient to deprive men of their free moral agency and make their acts subject to the control of courts.

It is not claimed in this argument, neither would it be claimed by any parties to this suit, that the present social system is an ideal state. Strikes are deplorable, and so are their causes. All men who engage in them hope for a time when better social relations will make them as unnecessary as any other form of warfare will some day be. But under the present conditions of industrial life, with the present conflicting interests of capital and labor, each perhaps blindly seeking for more perfect social adjustments, strikes and lockouts are incidents of industrial life. They are not justified because men love social strife and industrial war, but because in the present system of industrial evolution to deprive workingmen of this power would be to strip and bind them and leave them helpless as the prey of the great and strong. It would be to despoil one army of every means of defense and aggression while on the field of battle, and in the present of an enemy with boundless resources and all the equipments of warfare at their command.

It is confidently believed that this court, creating a precedent of the greatest importance to millions of men, will view this question in the light of all the past, in the light of all the social and industrial conditions of the present day; will fully protect the rights of workingmen to organ-

ize and unite for mutual defense, for the betterment of their condition, to work or cease to work—in short, to be free men, responsible as every other free man only for the direct consequences of their acts.

Respectfully submitted.

CLARENCE S. DARROW,
Counsel for Petitioners.

Office Supreme Court U. S.
FILED.
MAR 25 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

EX PARTE EUGENE V. DEBS, GEORGE W. HOWARD, SYLVESTER KELIHER, L. W. ROGERS, JAMES HOGAN, WILLIAM E. BURNS, ROY M. GOODWIN, AND MARTIN J. ELLIOTT, petitioners. | No. 11, Original.

BRIEF FOR UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

EX PARTE EUGENE V. DEBS, GEORGE W. HOWARD, SYLVESTER KELIHER, L. W. ROGERS, JAMES HOGAN, WILLIAM E. BURNS, ROY M. GOODWIN, AND MARTIN J. ELLIOTT, petitioners. | No. 11, Original.

BRIEF FOR UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS.

Petitioners were committed for contempt by an order or judgment of the circuit court for the northern district of Illinois. This judgment was rendered in a proceeding before Judge Woods, commenced by information and entitled in an equity suit pending in said court, in which the United States was complainant and some of these petitioners, with other parties, were defendants. The contempt of which they were found guilty was disobedience to a writ of injunction granted in said equity suit on July 2, 1894, by Judges Woods and Grosscup.

The petition claims the following alleged defects in the jurisdiction of the circuit court: That petitioners were tried in the contempt proceeding without a jury and not

under indictment, contrary to the Constitution of the United States, and particularly to the Fifth and Sixth Amendments thereto; that the information did not state or show any violation of the injunction by the petitioners; that the injunction order was void, because the suit in which it was granted was one of which the court could not take cognizance, the bill of complaint in such suit being "in effect a bill by the Government of the United States to maintain the public peace and to enjoin violations of the penal code of the United States;" that the Anti-Trust act of July 2, 1890, under which the circuit court claimed jurisdiction, was not applicable to the case, and, moreover, is unconstitutional as "an attempt to commit the enforcement of a penal statute to the circuit court of the United States in chancery, and thus to deprive persons charged with its violation of the right not to be put upon trial except upon presentment or indictment by a grand jury, and of the right of trial by jury, secured by the provisions of the Constitution of the United States, and particularly by the Sixth Amendment to the Constitution." The petitioners allege that they applied for a writ of *habeas corpus* to the circuit judge of the circuit; that he advised them to apply to this court, or some justice thereof; and that, in view of this advice, it would not be proper or respectful or productive of results to apply to any other judge of that circuit. For this reason the application was made to Mr. Justice Harlan, the justice of the Supreme Court assigned to that circuit, and by him referred to the full court, which issued thereon a rule to show cause returnable March 25, 1895.

STATEMENT OF FACTS.

The petition being defective in its statement of facts, certain exhibits have been printed by petitioners and annexed thereto by leave of court and consent of the Government. These exhibits include the bill of complaint in the original suit, the injunction order and writ, an abridged copy of the information by which the contempt proceedings were instituted against the four petitioners first named, the answer of said four petitioners thereto, and the order or judgment finding them guilty of contempt and sentencing them to imprisonment therefor.

It will be noticed that certain telegrams and other exhibits incorporated in the information are not printed therewith among the exhibits referred to. They were somewhat voluminous, and being evidential in nature, were omitted by consent of both parties in the interests of brevity. We understand that petitioners, on reconsideration, will ask the court to consider them.

The *bill of complaint* in the equity suit was brought by the United States of America under the direction of the Attorney General against the petitioner Eugene V. Debs and other individuals connected with the American Railway Union, and against the union itself. This bill does not seem to have been answered, and its allegations are therefore to be taken as true for the purposes of this proceeding, so far as necessary to sustain the injunction thereon granted.

The American Railway Union is alleged to be an association or organization of which the four first-named petitioners are officers, Mr. Debs being president, Mr.

Howard vice-president, Mr. Keliher secretary, and Mr. Rogers a director. (Exhibits, p. 6). The exact nature of this association was not described in the bill, which, however, shows that it has great power over the employees of the various railroad systems centering in the city of Chicago.

The names of these railroad systems are set forth at the commencement of the bill (pp. 3, 4), which alleges that they are corporations chartered and organized for the purpose of continuously doing business as common carriers of passengers and freight in interstate commerce; that their aggregate length of railroad owned and operated is over 120,000 miles; that each is engaged in a transportation business, subject to the Interstate Commerce act of February 4, 1887, and the acts amendatory thereof; that in their interstate business alone they carry annually more than twelve million passengers into and out of Chicago, besides many million tons of freight; that under contract with the Government they are obliged to carry and do carry the United States mails regularly and daily upon numerous specified trains at definite hours over said railroads, being Government post roads; that many of them are also required by act of Congress at any and all times to carry United States troops and supplies therefor, and that two of them are in the hands of receivers appointed by a United States court. This paragraph of the bill concludes with an elaborate description of the importance to the city of Chicago and to the United States in general of the interstate commerce conducted over the lines of these railway systems (pp. 4-6).

The bill further alleges that in May, 1894, there arose a dispute between the Pullman Palace Car Company and its employees, which resulted in a strike on the part of the latter. Thereafter Debs, Howard, Keliher, and Rogers, with others, combined to compel an adjustment of this dispute by means of a boycott against the cars manufactured by said company. In order to make said boycott effective, the members of said American Railway Union, or some of them employed as trainmen, switchmen, or otherwise, in the service of the railways above mentioned, were directed to refuse to perform their duties if the railroad companies by which they were employed should attempt to haul the sleeping cars manufactured by said Pullman Company. The bill alleged that these conspirators had already prevented some railroads from operating their trains or performing their usual duties as common carriers of passengers, and were still combining and conspiring together to extend such proposed boycott against Pullman sleeping cars by causing strikes among the employees of all railroads attempting to haul the same; that the conspirators knew that by contract with the Pullman Company such sleeping cars must be carried on the same trains which by contract with the Government carried the United States mails, and that sleeping cars were necessary for the operation of the railroad business; that they entered into the conspiracy with the intent and purpose of preventing said railroad companies and receivers from performing their duties as common carriers, by inducing their employees to leave and by preventing others from taking their place; that the con-

spirators are asserting that they will "tie up, paralyze, and break down any and every of said railway companies and receivers which may or does refuse to accede to their demands;" that they have also conspired to stop "any and all of the numerous important and vital kinds of interstate business and commerce other than railroad transportation between the State of Illinois and the other States of the Union, which are, and necessarily must be, dependent upon the continuous and untrammeled operation of said railroads;" and that they are aiming by said conspiracy "to secure unto themselves the entire control of the interstate, industrial, and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial, or commercial enterprises, save according to the will and with the consent of the defendants" (pp. 6–8).

The bill further alleges that the orders of these conspirators had been obeyed by numerous employees of said railroad companies and receivers, who had refused to obey orders or perform their usual duties, and that many of them had quit the service of the companies for the purpose and with the result of stopping the operation of the railroads, the transportation of mails, and the carrying on of such interstate traffic. It further avers that, "pursuant to said combination and conspiracy, and under the direction, as aforesaid, of said officers and directors of said American Railway Union," defendants and other persons

unknown confederated by threats, intimidation, force, and violence to prevent the employment of other persons to fill the vacancies aforesaid, and to compel the persons remaining employees of said railroad companies to quit the service or quit work. It further avers that in pursuance of said combination and conspiracy, and under such direction, defendants had, with force and violence, stopped, obstructed, derailed, and wrecked engines and trains engaged in interstate commerce and mail transportation, by locking switches, removing spikes and rails, turning switches, displacing and destroying signals, assaulting and interfering with and disabling employees, and in other ways (pp. 8, 9). It then goes on to make certain allegations with relation to the Union Stock Yards, which need not be set out (pp. 9, 10).

It avers that Debs and the other conspirators threaten, declare, publish, and announce that they will continue in their said illegal acts, and "that they can and will, if necessary to carry out the said unlawful combination and conspiracy above set forth, tie up and paralyze the operations of every railway in the United States and the business and industries dependent thereon;" and that unless restrained by the court defendants "will forthwith carry out their said threats and avowed purposes and intentions" (pp. 11, 12).

We have not attempted a complete *résumé* of the allegations of this bill, which is very clear and concise, but have incorporated merely enough to indicate its general scope.

The *injunction writ* is addressed to the defendants named and "to all other persons combining and conspiring with

them and to all other persons whomsoever, and to your counselors, attorneys," etc. It enjoins the following acts (pp. 18-21):

(1) "Interfering with, hindering, obstructing, or stopping any of the business of" certain named railroads "as common carriers of passengers and freight between or among any States of the United States."

(2) "Interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying passengers or freight between or among the States."

(3) "Interfering with, hindering, or stopping any trains carrying the mail," and "interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the States."

(4) "Interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purposes of or in connection with interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States."

(5) "Entering upon the grounds or premises of any of said railroads for the purpose" of such interference, etc., "or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce," etc.

(6) "Injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads," or "injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads," or "displacing or extinguishing any

of the signals of any of said railroads," or "spiking, locking, or in any manner fastening any of the switches of any of said railroads," or "uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce," etc., "or engaged in carrying any of the mails of the United States."

(7) "Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads, or the carriage of the United States mail by such railroads, or the transportation," etc.

(8) "Compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employees of any of said railroads, who are employed by such railroads and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation," etc., "to leave the service of such railroads."

(9) "Preventing any person or persons whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof in the carrying of the mails of the United States, or the transportation," etc.

(10) "Doing any act whatever in the furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation," etc.

(11) "Ordering, directing, aiding, assisting, or abetting in any manner whatever any person or persons to commit any or either of the acts aforesaid."

It will be noticed that defendants are restrained from attempting by *persuasion* to induce employees remaining in the service of the railroads to refuse to perform their duties, but that they are permitted to exercise all their powers of peaceable persuasion for the purpose of inaugurating strikes among said employees, except in pursuance of a conspiracy against them all.

The *information* refers to the bill of complaint, and recites the injunction writ. It alleges that the object of the American Railway Union and its officers was and is "to procure all the employees of the several railways within the United States to become members of the American Railway Union, and to concentrate the power and jurisdiction of said American Railway Union and all the members thereof under one official control, management, and direction, with power to order strikes or a discontinuance of the service of such employees with either or any of the railway companies of the United States at any time that said American Railway Union, its board of directors, or other officers should elect so to do, with or without sufficient cause;" that on June 26 or 27 it "had directed and ordered all the members of said American Railway Union engaged in the service of the Illinois Central Railroad Company in the transportation of the United States mails and of interstate commerce," &c., "to strike or leave the service of said company;" that thereafter similar orders were made with reference to other companies, and that before the injunction the union employees of these

companies had accordingly in a body left their service "for the avowed and express purpose of hindering, preventing, and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies" (pp. 23–4).

It avers service of the injunction through the daily newspapers, and also personal service upon the defendants, Debs, Howard, Keliher, and Rogers (p. 24).

It avers that prior to the issuance of the injunction, local unions had been organized "upon substantially all the railroads located in the Northwest, and extending from the city of Chicago westward to California," &c., and that the union was then engaged in organizing such local unions "upon all the main lines of road extending from said city of Chicago to the Atlantic Coast;" and that such work went on without change or interruption after the service of the writ of injunction, "for the express and avowed purpose of conferring upon said railway union power and authority to order strikes upon all of said roads as rapidly as said local unions could be organized," thereby preventing the companies from discharging their duties in mail transportation and interstate commerce (pp. 24–5).

And further avers that in pursuance of "orders and directions" of the conspirators, railway strikes prevailed generally on the lines of railway companies referred to, and that mail transportation and interstate commerce was thereby greatly hindered, delayed, and prevented (p. 25).

It further avers that upon the Illinois Central and other named lines many of the strikers exercised intimi-

dation and open violence; that employees who continued in the service or who were employed to take the place of the strikers were assaulted and intimidated by physical violence or threats of personal injury; that the strikers and their sympathizers took forcible possession of some of the roads within and adjacent to Chicago, and by physical force prevented the passage of trains carrying United States mail and interstate commerce; that engines and trains were derailed, passenger trains stoned or fired upon, &c.; that the mobs were in many instances led by the strikers "who had gone out of service upon the orders of these said defendants as officers of the said American Railway Union," and that "mobs of strikers and others were massed at different points in such numbers as to be beyond control of the Government, State, and municipal authorities." That at least a thousand freight cars were destroyed by fire, some of them loaded with interstate merchandise; that signal towers and other appurtenances of railroads were also destroyed by fire; that employees refusing to obey defendants' orders were violently assaulted, beaten, and bruised; and that many lives were sacrificed, "all of which was a direct result of the numerous strikes ordered as aforesaid."

It further avers that, as defendants well knew, many of such violent acts had been perpetrated before the service of the writ of injunction, but alleges that—

> Notwithstanding such knowledge, and the further knowledge that violence invariably follows all strikes of a similar character, said defendants, in willful violation of the order of said court, daily and continuously after the service of said writ of injunction issued their

> orders and directions for the employees of said railways to leave such service in a body, and also continued such orders while the said mobs were in partial possession of said railroads and engaged in forcible resistance of the orders of this court and its officers (pp. 25–6).

The information further avers that the strike was not ordered on account of any wrongful act of the railroad companies or their officers, but that its purpose was as follows:

> To wrongfully and unlawfully establish a boycott against the so-called Pullman sleeping cars, which said sleeping cars were used in great numbers by said railroad companies in trains carrying the United States mail and passengers travelling at great distances from State to State, and through the several States (p. 26).

The information further avers that—

> To make said boycott effectual, said directors of said American Railway Union, including said defendants, ordered that no trains of cars of any kind or character should pass over the tracks of either of said railroad companies within and adjacent to the city of Chicago until the use of said boycotted cars had been abandoned by all of said railroad companies (p. 26).

The information further avers that the board of directors of the American Railway Union assume to have and actually have "full authority and power to order strikes and boycotts, and to discontinue the same, under the rules of said American Railway Union" (pp. 26–7).

It avers that Eugene V. Debs threatened to continue the violation of the injunction and increase the membership

of the American Railway Union by forming new local unions and then immediately ordering the members thereof to strike, thereby making the boycott more effectual (p. 27).

This information was answered by the defendants Debs, Howard, Keliher, and Rogers, denying many of the allegations thereof. Upon the issues thereby raised evidence was taken (p. 36). An information was presented August 1, 1894, making similar charges against five other persons, who also answered, and the proceedings terminated in an order, entered December 14, 1894, finding all of the respondents, except one McVean, guilty of contempt "in disobeying the mandates of the injunction issued herein on the 2d day of July, A. D. 1894." The order "adjudged and decreed" that Debs be "confined and imprisoned in the county jail of Cook County, Illinois, for and during a period of six months," and the other seven petitioners for three months each.

The opinion of Judge Woods is very full, and is reported as *United States* v. *Debs* (64 Fed. Rep., 724).

SUMMARY OF ARGUMENT.

Our argument will be as follows:

I. There is only one question in this case, namely, whether the court had jurisdiction, in the strict sense of that word, to issue the writ of injunction in the original suit, or any part thereof. No claim can be made in such a *habeas corpus* proceeding of

(*a*) error in the original suit; as

(*b*) that the United States was not a proper party complainant; or

(*c*) that the injunction was too broad.

Nor can any claim be here made of

(*d*) insufficiency of the information by which the contempt proceedings were instituted; or

(*e*) error in those proceedings; or, more particularly,

(*f*) that there was no jury trial; or

(*g*) that the contempt charged is criminal in its nature.

II. The court had jurisdiction to grant the original injunction and every part thereof.

For

(*a*) equity has general jurisdiction over violations of property rights; and though it has put limits upon the exercise of its own jurisdiction, a transgression of these limits is simply error.

Moreover,

(*b*) defendants' combination was in main an attack upon property rights; and upon rights in which the general public of the United States was deeply interested;

(*c*) the Attorney General had the power, independent of statute, to sue for the protection of the public;

(*d*) the case was cognizable in equity by general principles;

(*e*) and also by the Anti-Trust law;

(*f*) which law is constitutional.

I.

Jurisdiction to grant the injunction the only question reviewable on habeas corpus.

No questions are reviewable except such as are strictly jurisdictional. Thus

A. *Error in awarding an injunction* is no defense to contempt proceedings, still less a ground of complaint in *habeas corpus*.

There must have been something worse than mere error in the original suit; there must have been an absolute lack of jurisdiction in the court, so that the writ of injunction is a mere nullity. (*Savin, Petitioner*, 131 U. S., 267; *In re Tyler*, 149 U. S., 164, 180; Rapalje on Contempt, §§ 40, 113, and cas. cit.) This has just been applied by the court of appeals for the sixth circuit to the very similar case entitled *Ex parte Lennon* (64 Fed. Rep., 320). "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." (*Elliott* v. *Peirsol*, 1 Pet., 328, 340.)

If the injunction was erroneously granted, petitioners had a right to appeal, or they could go to the judge who signed the writ, show him his error, and ask for an order vacating it. If the injunction was clearly erroneous, it must be presumed that the court would of its own motion forthwith vacate the order as soon as its attention was called to the error. If the question is one of doubt, there must be some person or persons whose duty it is to solve the doubt and make a final decision. That duty, of course, rests ultimately in the appellate court. There must be somebody, however, whose decision is final until the appellate court has had time to hear and decide the controversy.

The court issuing the injunction considers it sound. Mr. Debs and his counsel consider it erroneous. Which is to decide? There has never been any doubt on that question. If equity has general jurisdiction over the subject-matter, then its orders must be obeyed until they

are reversed or set aside. If the judge does any flagrant wrong, he can be punished by impeachment. (See *Hunter* v. *State*, 6 Ind., 423, cited in Rapalje on Contempt, § 141.) This remedy was actually appealed to in the case of Judge Peck, of the United States district court for Missouri, who was acquitted by a single vote, and whose trial resulted in the act of March 3, 1831, ch. 99, § 1, now Rev. St., § 725. (*United States* v. *Day*, 6 Am. Law Reg. O. S., at pp. 636–7.) A claim of appellate jurisdiction by the party enjoined is as anarchistic in tendency as the claims which were made by South Carolina in the nullification controversy of 1833.

Federal tribunals have exercised no appellate jurisdiction in contempt proceedings except in the peculiar case of *Worden* v. *Searls*, 121 U. S., 14. But that error in the original suit does not excuse from contempt is well settled in States where such appellate jurisdiction is freely exercised. The latest well-known recognition of this principle is in the contempt case against the New York State Board of Canvassers for violating a *mandamus* in canvassing the election returns of 1891. (*People ex rel. Platt* v. *Rice*, 144 N. Y., 249, 261–2.)

Thus, for instance, it is not material whether the complainant has an adequate remedy at law. If the legal remedy is adequate, equity ought not to interfere, and interference on its part is error; but the defect is not jurisdictional.

"The objection of adequacy of legal remedy as here presented goes to the want of equity and not to want of power." (*In re Tyler*, 149 U. S., 164, 181; *Chemung*

Canal Bank v. *Judson*, 8 N. Y., 254, 263; see also *Hollins* v. *Briercfield Co.*, 150 U. S., 371, 380–1, and cas. cit.; *Insley* v. *United States*, 150 U. S., 512, 515.)

B. *Whether the United States was a proper party complainant* is not a jurisdictional question, and hence does not arise on contempt or *habeas corpus* proceedings.

If the acts enjoined are unlawful in their nature, and such as chancery has power to enjoin at suit of the proper party complainant, then it is merely error if it enjoins at the suit of a party not sufficiently interested to enable him by rights to sue.

The ancient distinction between lack of jurisdiction over parties and subject-matter on the one hand and mere mistakes in joinder of parties on the other is well exemplified in all the Code States. The typical form of the Code provisions as to demurrers classifies demurrable defects as follows: "(1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or (2) that the plaintiff has not legal capacity to sue; * * * or (6) that the complaint does not state facts sufficient to constitute a cause of action." (Pomeroy on Remedies, § 433.)

The defense that a plaintiff is without legal capacity to sue is waived by not pleading it, both under general chancery practice (1 Daniell Ch. Pl. & Pr., 6th ed., p. 630, note) and by the codes of procedure. But lack of jurisdiction over subject-matter can not be waived (Wells on Jurisdiction, § 66, and cas. cit.; *Matter of Walker*, 136 N. Y., 20, 29); a principle often applied by this court in dismissing appeals and writs of error, or reversing and directing the dismissal of causes, on its own motion.

C. *That the injunction is too broad* can not be claimed upon this application. For there is a general finding that it is violated. If, therefore, there be a valid clause in the injunction, the finding must be applied thereto; at least this is the case as to the portion alleged in the information to have been violated.

It is well established, even in criminal proceedings, that a single good count in the indictment sustains a verdict of guilty, although the other counts may be defective. (*Evans* v. *United States*, 153 U. S., 584, 595.)

Contempt proceedings have been called *quasi*-criminal in character (*Ex parte Kearney*, 7 Wheat., 38, 43; *Ex parte Watkins*, 3 Pet., 193, 208; *New Orleans* v. *Steamship Co.*, 20 Wall., 387, 392; *Hayes* v. *Fischer*, 102 U. S., 121,) but certainly are not any more technical.

Nor is too great breadth a jurisdictional matter. "If, on inspection of the bill, the injunction is found to be too broad, the defendant is not to abridge it at his discretion. His remedy is to apply for such a modification of it as is suited to the case made in the bill, and in the meantime he must obey the command of the writ." (*Richards* v. *West*, 2 Gr. Ch., 456, 459, *per* Vroom, Ch.)

D. But even *insufficiency in the information* is not ground for holding contempt proceedings void upon a *habeas corpus*.

Petitioners joined issue and went to trial. Evidence was taken, and the court decided the cause upon this evidence, which does not, and could not, properly appear in this record. Some of it was most important, as would appear from the opinion, could it be read for this purpose (p. 760).

Evidence could have been introduced tending to show that petitioners had violated clauses of the indictment not referred to in the information; and if no objection was made that the proof was not sustained by the pleadings, it would become evidence in the case for all purposes. This is the rule in civil actions in general. (*Railroad Co.* v. *Lindsay*, 4 Wall., 650, 656; *Roberts* v. *Graham*, 6 Wall., 578.)

Contempt proceedings are not in this respect analogous to prosecutions for crime. They are commenced in various informal ways (see *Cuddy, Petitioner*, 131 U. S., 280, 281), commonly by mere affidavit. In some instances neither affidavit nor notice is necessary, and the order of commitment is the first paper in the proceeding. (*Ex parte Terry*, 128 U. S., 289, 293, 306.) But even indictments are not given the same scrutiny on *habeas corpus* as on writ of error; that is, if the crime charged is one within the general jurisdiction of the court, error in holding that the indictment sets forth the necessary elements of the accusation is not jurisdictional. (*Ex parte Yarbrough*, 110 U. S., 651, 654; *Cuddy, Petitioner*, *supra*, at p. 286.)

Thus in *Ex parte Parks* (93 U. S., 18, 20) Mr. Justice Bradley said, denying a writ of *habeas corpus*:

> Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings, on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case.

E. *Error in contempt proceedings* is nowise different in effect upon *habeas corpus* from error in the original suit.

It can not be made the basis of *habeas corpus* proceedings. (*Ex parte Bigelow*, 113 U. S., 328; *In re Tyler*, 149 U. S., 164, 180–1; *In re Swan*, 150 U. S., 637, 651; *United States* v. *Pridgeon*, 153 U. S., 48, 62.)

It is therefore necessary for petitioners to show that the contempt proceedings were void *ab initio*—that there was no jurisdiction in the court to entertain them. If there was no jurisdiction, then a writ of *habeas corpus* was proper. (*Ex parte Fisk*, 113 U. S., 713, 718; *In re Sawyer*, 124 U. S., 200.)

This principle that a writ of *habeas corpus* can not be granted on account of mere errors is not confined to contempt proceedings. It applies equally to other proceedings, such as those brought to secure the imprisonment of a fraudulent debtor (*Stevens* v. *Fuller*, 136 U. S., 468), or to criminal trials. (*Ex parte Carll*, 106 U. S., 521; *In re Wood*, 140 U. S., 278; *Andrews* v. *Swartz*, U. S. S. C., Feb. 4, 1895.) In these last-named cases petitioner alleged that the errors of the court deprived him of constitutional rights; but as the court had jurisdiction over person and subject-matter, the writ was dismissed.

F. *Grand juries and petit juries* are unknown in chancery, and can not be demanded. It is unnecessary to multiply authority to this effect. (*Eilenbecker* v. *Plymouth County*, 134 U. S., 31, 36; Rapalje on Contempt, §§ 10, 112 and cas. cit.)

G. *That the act of contempt is also a crime* does not make a commitment for contempt erroneous; still less, a

nullity. If it is a crime it is punishable criminally, but none the less is it punishable by chancery proceedings as an act of disobedience to the court. "Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offense as a crime after it has been committed." (*Eilenbecker* v. *Plymouth County*, 134 U. S., 31, 38.)

Were the rule otherwise, section 4 of the Anti-Trust act of 1890 would be altogether nugatory, and the same principle would render unconstitutional the grants of power to enjoin in section 6 of the Interstate Commerce act.

This question also, however, is settled by *Savin, Petitioner*, 131 U. S., 267. (See also auth. cit. in 3 Am. and Eng. Cycl. of Law, at p. 794.)

It is a mistake to suppose that chancery in contempt proceedings invades the jurisdiction of the criminal courts.

The act punished by chancery is disobedience to its own order. This order must in some way be brought to the knowledge of defendant before he can be asked to obey it. (*Pettibone* v. *United States*, 148 U. S., at pp. 206–7.)

He can not complain of the summary nature of the contempt proceedings for the very reason that he has had full notice of the court's order before he disobeyed it.

Jury trials are part of the common-law system, and common law presumes conclusively that every man knows the law. A man may be punished for crime who was altogether ignorant of the unlawful nature of his act and was destitute of any criminal intent, the crime being a mere *malum prohibitum*. (*In re Coy*, 127 U. S., 731, 754.)

H. Chancery had jurisdiction of the contempt proceedings if it had jurisdiction to grant the injunction for whose violation those proceedings were instituted. Jurisdiction to commit for contempt is always incidental to jurisdiction to enjoin. Otherwise the injunction would be an absurdity; for breach of an injunction is not made a tort or a crime by the common law or by any statute.

To obtain a writ of *habeas corpus*, petitioners must, therefore, show that the court had no jurisdiction over the case made by the original bill in the injunction suit; or that it had no jurisdiction over so much of the bill as was made the foundation of the injunction actually granted; or, at least (if our argument under D. *supra* is ill founded), that it had no jurisdiction over so much of the bill as became the foundation of that part of the injunction writ which is alleged to have been violated.

II.

Jurisdiction to grant the injunction in question complete.

A. *Equity's jurisdiction* extends at least over the whole domain of property rights. Any step within this domain, though unwarranted by statute or precedent, is at worst error. It is not a nullity.

It has never been doubted that the general jurisdiction of chancery in the matter of injunctions extends over all invasions of property rights, although it may err in exercising this power, because there is adequate remedy at law, or because there is no precedent and no statute upon which to base the particular restraint proposed.

This was admitted by the majority of the Supreme Court in the leading case of *In re Sawyer*, 124 U. S., 200. It was maintained in that case by Chief Justice Waite and Mr. Justice Harlan that all injunctions are sufficiently within the jurisdiction of chancery to make their violation a contempt. The majority of the court held otherwise in that case, where a mayor had been enjoined from exercising a power of removal over subordinate officials. Mr. Justice Gray, in delivering the opinion of the court, said (p. 210):

> The office and jurisdiction of a court of equity, *unless enlarged by express statute*, are limited to the protection of *rights of property*. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers.

The question of equity jurisdiction, as distinguished from equity jurisprudence, is clearly discussed by Mr. Pomeroy (1 Pom. Eq. Jur., §§ 129–131). He says:

> It is important to obtain at the outset a clear and accurate notion of what is meant by the term "equity jurisdiction." It is used in contradistinction to "jurisdiction" in general and to "common law jurisdiction" in particular. In its most general sense the term "jurisdiction," when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice,

and brought for that express purpose. It is plain that the term used in this strict sense *may* be applied to courts of equity as well as to any other tribunals. With this signification of the word it would be said that an equity court has no jurisdiction to try the issues arising upon an indictment, and to render judgment in a criminal prosecution. The entire proceeding would be null and void. * * * In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential—either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable; or if it be a remedy which *may* also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. At the same time, if a court clothed with the equity jurisdiction as thus described should hear and decide, according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, however erroneous it might be and liable to reversal, would not necessarily be null and void. On the contrary, as will be more fully stated hereafter, the objection that the case does not come within this so-called equity jurisdiction must ordinarily be definitely raised by the defendant at the commencement of the proceedings, or else it will be regarded as waived, and the judgment will not even be erroneous. * * * It is plain, from the foregoing definitions, that the question whether a given case falls within

> the equity jurisdiction is entirely different and should be most carefully distinguished from the question whether such case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity powers of the court should be exercised in maintaining the primary right, estate, or interest of the plaintiff. The constant tendency to confound these two subjects, so essentially different, has been productive of much confusion in the discussion of equitable doctrines. * * * In other words, the equity jurisdiction may exist over a case although it is one which the doctrines of equity jurisprudence forbid any relief to be given, or any right to be maintained. This conclusion is very plain, and even commonplace, and yet the "equity jurisdiction" is constantly confounded with the right of the plaintiff to maintain his suit, and to obtain the equitable relief.

Mr. Pomeroy quotes with approval the discussion of jurisdiction in general by Judge Folger in *Hunt* v. *Hunt* (72 N. Y., 217, 228–230), of which we extract a few sentences:

> Jurdisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. * * * So there is a more general meaning to the phrase "subject-matter," in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. * * * We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action.

Thus, if an equity court should apply an equitable remedy to a property right of a purely legal nature, when there is adequate remedy at law, it would be error, involving a violation of the constitutional right of trial by jury (*Scott* v. *Neely*, 140 U. S., 106); but the court would still have jurisdiction, so that, as already shown, the error could not be considered collaterally. If it should undertake to deal with such a right by awarding a simple judgment for damages, there might be strong ground for arguing that its proceedings were a nullity. If it should undertake to give a judgment for damages for assault and battery, the nullity of its proceedings would probably be unquestioned.

Thus, also, if a crime has been committed, equity jurisdiction does not embrace its punishment. If, however, a crime is threatened, and it will involve injury to property rights for which there will be no adequate remedy at law, then equity jurisdiction authorizes an attempt at its prevention by the proper writ of restraint. If the writ is disobeyed, equity can punish the affront to itself; the criminal courts will deal with the offense against public morals; the person injured has his action in law or his suit in equity, or a right to elect between them, as the case may be; and if the public in general are injured in their property rights they have the same relief.

In *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. Ch., 378–80, Chancellor Kent said (discussing a bill to enjoin unlawful banking, which was a *quasi*-criminal offense by statute):

> If a charge be of a criminal nature or an offense against the public, *and does not touch the enjoyment*

> *of property*, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. * * * If the defendants are carrying on banking operations contrary to law, they ought undoubtedly to be restrained; but I can not be of opinion that the operation is *such a mischief or public nuisance* as to require the immediate and extraordinary process of this court to abate it. * * * There are *no particular individuals affected* or disturbed in the enjoyment of their private rights by the banking power assumed in this case.

To the same effect see *Sparhawk* v. *Union Passenger Ry. Co.*, 54 Pa. St., 401; *Emperor of Austria* v. *Day and Kossuth*, 3 De G. F. & J., 217.

Of course, the decree of a court of chancery may be void because the subject-matter is out of the jurisdiction of the particular court in question, while it may be within chancery jurisdiction in general—as a decree of a State court concerning a subject-matter cognizable only by a Federal tribunal (*Hickey* v. *Stewart*, 3 How., 750), or the decree of based upon a statutory jurisdiction, when the court goes outside of its statutory power (*Williamson* v. *Berry*, 8 How., 495), or of its territorial jurisdiction. (*Rose* v. *Himely*, 4 Cranch., 241.) These principles are especially applicable to courts of limited jurisdiction, or courts acting within some special jurisdiction, as to which many cases are cited in *Noble* v. *Union River Logging R. R.* (147 U. S., 165, 173–5).

We believe that the only case in which this court has ever found a court of chancery stepping outside of chancery jurisdiction, except in pursuance of some special statutory authority, is *In re Sawyer, supra.*

B. *The damage done by petitioners* was in main damage to property rights, although it included also some restraint on personal liberty.

The cause was thus within "equity jurisdiction." We shall now endeavor to show that it fell also within the narrower limits of "equity jurisprudence."

C. *The Attorney General may sue in chancery in the name of the United States to protect the interests of the public.*

(1) He is the person charged with the duty of directing suit to be brought whenever the United States is itself pecuniarily interested or is under any obligation to another party, or is obliged through the judiciary department of its Government to protect the rights of the public in general. These three propositions have all been recognized repeatedly in the cases involving the validity of patents to public lands; and the first two propositions were in those cases directly involved.

Without referring to the earlier cases, the law was summed up as follows by Mr. Justice Miller in *United States* v. *San Jacinto Tin Co.* (125 U. S., 273, 285–6), discussing suits by the Attorney General to vacate land patents:

> If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud

> which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear *any obligation on the part of the United States to the public* or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances. In all the decisions to which we have just referred it is either expressed or implied that this interest *or duty* of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings either by pleadings or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, *and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.*

These remarks have been frequently referred to. They are incorporated in full in the opinion of Chief Justice Fuller in *Cartner* v. *United States* (149 U. S., 662, 671–2).

The language of Mr. Justice Miller with relation to suits based upon the duty of the United States toward the public in general was not absolutely necessary to the decision in the San Jacinto case. Its correctness, however, was brought squarely before this court for adjudication in the well-known case of the *United States* v. *American Bell Telephone Co.* (128 U. S., 315). That was a bill filed by the direction of the Solicitor General as Acting Attorney

General (the Attorney General regarding himself as disqualified from taking part in that case), to cancel as fraudulent the patent theretofore issued for the invention of the Bell telephone. The very able and elaborate argument of Mr. Storrow on behalf of the defendant is reported at length at pages 327 to 346. He insisted that there was ample remedy at law to everybody interested, by pleading and proving the nullity of the patent, and that the Attorney General had no authority to bring suit in the name of the United States on behalf of the general public. Mr. Justice Miller, in reply to this contention, quoted a portion of the San Jacinto opinion above set forth, and commented upon it as follows (pp. 367–8):

> This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court can not thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also *where it does not appear that any obligation existed on the part of the United States to the public* or to any individual. The essence of the right of the United States to interfere in the present case is *its obligation to protect the public from the monopoly* of the patent which was procured by fraud, and it would be difficult to find language more aptly used

> to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the Government of the United States.

Mr. Justice Miller further comments on the case of *Mowry* v. *Whitney* (14 Wall., 434) (which case held that an individual could not sue to procure the annulment of a patent), as follows (p. 369):

> It is said that this language of the court is *obiter* and does not decide directly that a suit can be brought in chancery to cancel or annul a patent issued by the United States Government for an invention. It is true that what the court was called upon to decide was, that a private citizen could not bring such suit, but evidently the reason given for it must be held to establish the principle upon which the court acted, and that reason was that the private citizen could not do it, because the right lay with the Government. The duty and the right of the Government to bring an action which would end in the destruction of the patent, *and which would thus protect everybody against the asserted monopoly of it*, was the reason why the private citizen could not for himself bring such a suit.

So the Attorney General of a State may sue in equity to restrain acts interfering with the rights of the public, such as rights of fishing, boating, and bathing. (*Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass., 361, 363–4, quoted by Mr. Justice Harlan in *Coosaw Mining Co.* v. *South Carolina*, 144 U. S., 550, 566; see also *Sparhawk* v. *Union Passenger Ry. Co.*, 54 Pa. St., 401; *People* v. *Powers*, 83 Hun., 450.) It is the same principle, indeed, which governs all suits by the Attorney General to abate or enjoin public nuisances.

(2) It is unnecessary to discuss the vast injury done the public by this gigantic blow at interstate commerce. So long as the period of injury lasted (and it was admittedly ended only by the injunctions granted by the courts, 64 Fed. Rep., 759), it was probably the most disastrous ever known, short of actual war.

D. *There was a good cause of action in equity, independent of the Anti-Trust law of* 1890.

It remains to consider whether the losses to the public resulting from this Debs campaign were *damnum absque injuria;* whether, if *injuria*, the injury was one for the Federal Government, as distinguished from the governments of the States, to redress; and whether equity afforded a remedy for the evil.

(1) Is the public loss *damnum absque injuria?* Had Mr. Debs and his associates the right to plan and carry out the project described in the bill and information?

It is not necessary to discuss the questions raised in the ordinary strike cases, such as *Arthur* v. *Oakes* (63 Fed. Rep., 310).

It may be conceded that a body of men, having a real or supposed grievance against their employer, may go out at any moment without fear of an injunction. Even if their abandonment of duty is malicious, in some way like that suggested by Judge Woods in the case at bar, at page 763, the remedy must be sought elsewhere than in equity.

This case presents a totally different question.

Petitioners are not strikers. They were not railroad employees, so far as appears. They are officers of an association, presumably supported by salaries contributed.

The injunction is not sought to make them work, as in the Oakes case. It is sought to keep them quiet. They are outsiders interfering between the railroad companies and their employees, to the great detriment of the public.

The acts enjoined, and yet continued in violation of the injunction, are ordering strikes by all members of the organization they control, and actively extending that organization into new regions in order to extend also the strike and its consequent disasters to the public.

These acts are committed with two objects:

1. To boycott the Pullman Palace Car Co.

2. To monopolize the railroad business of the country.

They also have the effect of causing lawless acts among their confederates, involving great loss of property, and even some loss of life.

Such combinations are probably criminal conspiracies at common law, although the act of each individual striker in striking be lawful.

It is not intended by us here to set forth the ancient and modern authorities upon the law of conspiracy. These cases may be found collected by various authors, with varying views, as in Carson's Wright on Criminal Conspiracies, in Cogley on Strikes, and in a recent address of C. C. Allen, esq. (Am. Bar Asso. Proc. of 1894, p. 299).

Judge Gibson in 1821 said that a conspiracy was indictable at common law, though the acts proposed were such as would be lawful for an individual, "where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals." (*Common-*

wealth v. *Carlisle*, Brightly, 36.) In the same year Judge Buchanan, in *State* v. *Buchanan* (5 H. & J., 317), said: "Every conspiracy * * * to do a lawful act * * * for a purpose which has a tendency to prejudice the public in general is an indictable offense." Mr. Carson considers that the weight of authority is to this effect (p. 123).

There can be no doubt that such combinations were unlawful, whether or not their unlawfulness amounted to criminality.

Contracts in restraint of trade are illegal whenever they are prejudicial to the public interests (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 396, and cas. cit.), and other contracts or combinations have been declared objectionable for like reasons. (*Vertue* v. *Lord Clive*, 4 Burr., 2472.) Strikes have been spoken of as lawful or unlawful according to their special circumstances. (Id.; and *Commonwealth* v. *Hunt*, 4 Met., 111.)

The law, both judge-made and statutory, has tended to relax as against labor organizations formed for the purpose of improving the condition of their members as to hours, wages, and the like; but it has not yet, we believe, gone so far as to sanction combinations to interfere with the contracts of third parties, or to establish a monopoly, although some such combinations may be safe as against Federal interference while illegal in fact. (*United States* v. *E. C. Knight Co.*, 156 U. S., 1.)

It will be remembered that here the railroads were under contracts with the Pullman Company for the use of the latter's cars. So far as appears, the railroads were satisfied with the arrangement, the traveling public

was satisfied, and even the employees of the railroads, so far as they had not already quit work on July 2, were satisfied with this, as they were with their wages, hours of work, and condition and treatment in general.

Mr. Debs and his associates, in violation of the injunction, now came in and induced these workmen to join his organization, with intent to direct them also to strike, and thus force the railroads to break their contracts; that is, to do an unlawful act. This brings us to the consideration of the law of

Boycotts. It may be conceded that boycotts are sometimes lawful. A man may refuse to do business with his neighbor, because he disapproves of him, or even does not like him. A society of men may adopt a non-intercourse resolution. Some cases have even gone so far as to say that an employer of labor may boycott his neighbor by discharging all his workmen who have dealings with the obnoxious person. (*Heywood* v. *Tillson*, 75 Me., 225; *Payne* v. *R. R. Co.*, 13 Lea, 507, two judges dissenting.) But that if A dislikes or disapproves of B, he can force C also to boycott him by unlawfully breaking contracts, is, we believe, a step beyond any precedent. If C yields, and breaks his contract with A, it is submitted that B has a cause of action against A analogous to the action for enticing away a servant. (*Walker* v. *Cronin*, 107 Mass., 555, 567; *Temperton* v. *Russell*, L. R. 1893, Q. B. D., 715, 727.) But if C refuses to yield, and A in carrying out his unlawful purpose disables C from performing his duties toward D, and thus ruins or grievously damages the latter, then it is submitted that D also has a right to legal pro-

tection. A, B, C, and D represent the American Railway Union, the Pullman Palace Car Company, the railway companies, and the general public.

The cases in the books are numerous and not always easy to reconcile. We cite a few of the more recent ones:

In *Old Dominion S. S. Co.* v. *M'Kenna* (30 Fed. Rep., 48), a Longshoremen's Union, composed of persons not connected with plaintiff, interfered between plaintiff and its employees, procuring the latter to strike, and endeavored, with partial success, to create a general boycott. On motion to discharge from arrest, an action in tort was sustained.

In *State* v. *Stewart* (59 Vt., 273), there is copious citation of authority in support of an indictment for criminal conspiracy in endeavoring to ruin a concern of the kind known as a "scab shop," the court (pp. 289–90) regarding mere threats of ostracism as sufficient intimidation. (See also remarks of Mr. Justice Brewer in *United States* v. *Kane*, 23 Fed. Rep., 748.)

In *Crump* v. *Commonwealth* (84 Va., 927, 944) it was held indictable to boycott certain "scab" printers by notifying their customers not to deal with them on pain of being themselves boycotted. (See also remarks of Judge Carpenter in *State* v. *Glidden*, 55 Conn., 46, 76; and of Judge Taft in *Toledo, Ann Arbor and North Michigan Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 730, 737–8; *Sherry* v. *Perkins*, 147 Mass., 212; *Casey* v. *Cincinnati Typographical Union No.* 3, 45 Fed. Rep., 135; *Coeur d'Alene Mining Co.* v. *Miners' Union*, 51 Fed. Rep., 260.)

In *Regina* v. *Duffield* (5 Cox C. C. 404), it was held indictable for outsiders to endeavor to procure a strike, although proper for the workmen themselves to combine for that purpose.

In *Temperton* v. *Russell* (L. R. 1893, Q. B. D., 715) defendants were committeemen of certain trades unions engaged in boycotting a firm of builders. Plaintiff, a master mason, was requested to join in the boycott and refused. Defendants then began a boycott against him, inducing materialmen to break their contracts with him. A verdict for damages was sustained by the court of appeals. (Lord Esher, M. R., and Lopes and Smith, L. JJ.)

So a strike, as well as a boycott, has sometimes been held unlawful on account of the impropriety of the motive.

Thus, in *Carew* v. *Rutherford* (106 Mass., 1), plaintiff, a freestone cutter, was fined $500 by some of his employees (members of the Journeymen Freestone Cutters' Association) for having some work done out of the State. The fine was then enforced by a strike. The strike was held unlawful, because it was for the purpose of extortion.

In *State* v. *Donaldson* (32 N. J. Law, 151), a strike was held unlawful when its object was to force the discharge of certain men obnoxious to the strikers. (See also *Regina* v. *Bunn*, 12 Cox C. C., 316, decided by Mr. Justice Brett in 1872.)

On similar principles rests the actionability of such conspiracies as to hiss an actor off the stage. (*Gregory* v. *Duke of Brunswick*, 6 Man. & Gr., 205.)

In *Callan* v. *Wilson* (127 U. S., 540, 555–6), appellants, Knights of Labor, were charged in the police court

of the District of Columbia with conspiracy to boycott. In holding them entitled to jury trial Mr. Justice Harlan said that they were charged with "by no means a petty or trivial offense," but "an offense of grave character, affecting the public at large."

In *Arthur* v. *Oakes* (63 Fed. Rep., 310, 321) the same learned justice said:

> According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others, or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employee or body of employees to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law.

Perhaps the latest collection of authorities is in *Longshore Printing Co.* v. *Howell* (38 Pac. Rep., 547) (Oregon, Dec. 17, 1894), where substantially the same conclusion is reached.

As to combinations in antagonism to public interests.

It is not necessary to consider whether the intent of any individual striker, or squad of strikers, or even of all the strikers on any one railroad, could be considered by the law.

A combination of acts, each harmless in itself and lawful standing alone, may be an offense against the law. To take a very simple case, while every man has the right to walk along the sidewalk at moderate speed, a procession of men is ordinarily made unlawful unless it has a license,

and even then it must walk in the street. "I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful." (Lord Chancellor Halsbury in *Mogul S. S. Co.* v. *McGregor*, L. R. 1892, App. Cas., 25, 38.)

Such a combination is unlawful when it is formed for the purpose of obtaining despotic power over a whole trade or industry.

In *Cousins* v. *Smith* (13 Ves., 541) Lord Eldon said:

> The transaction stated by this bill is a combination of the whole body of grocers in London, the effect of which is that all persons dealing in this article are compelled to purchase upon the terms dictated by this committee, having the means of buying up all the fruit imported from all parts of the world. * * * This is not according to the legal definition of the term forestalling, much less regrating; still less monopolizing; but in the consideration of a court of equity it contains the mischief of all three.

So a large coal combination was held unlawful in *Morris Run Coal Co.* v. *Barclay Coal Co.* (68 Pa. St., 173), and a salt combination in *Salt Co.* v. *Guthrie* (35 Ohio St., 666). A pooling agreement among forwarding lines on the Erie and Oswego canals was held "injurious to trade or commerce" in *Hooker* v. *Vandewater* (4 Denio, 349). Other authorities are cited in 1 Wharton on Contracts, §§ 442, 442*a*, including a decision by Mr. Justice Grier, when president of the district court of Pittsburg in 1842, annulling a pooling agreement on the Pennsylvania Canal.

Applying this principle to labor combinations, Mr. Wharton says that to make them illegal "the use of undue influence, amounting to either force or fraud, must be part of the agreement, or the agreement must amount to *an entire absorption of the particular kind of labor*, so as to establish virtual duress. * * * It is as much against the policy of the law to absorb all the labor in the community * * * as to buy up the necessaries of life." (1 Wharton on Contracts, § 439, citing authorities.)

Thus it was held lawful for all the stevedores in the port of Melbourne to combine and parcel out the business among themselves by an arrangement in the nature of pooling; but not to combine and assume to dictate to every merchant whom he should hire. (*Collins* v. *Locke*, L. R. 4 App. Cas., 674.) Conversely, combinations of employers with a view to lockouts have been held illegal. (*Hilton* v. *Eckersley*, 6 El. & Bl., 47.)

(2) It is for the Federal courts, not those of the States, to right these wrongs.

Reliance has been placed on certain cases which hold that until Congress acts it is for the State courts to protect commerce, such as *Transportation Company* v. *Parkersburg* (107 U. S., 691, 701–2).

It may be remarked that the Government's interest in the mail (*Searight* v. *Stokes*, 3 How., 151, 169) is alone enough to give it a standing as complainant; but there is no need of resting upon such narrow ground, for Congress, by its legislation, has already assumed most complete control over interstate railway transportation. Whatever may have been the case before this legislation, it can not

now be disputed that interstate railway commerce, like interstate ocean, river, or lake commerce, is within the protection of the Federal courts.

Before this legislation, indeed, this principle was recognized in the *Case of the State Freight Tax* (15 Wall., 232 275), a case involving a tax upon railway tonnage for the quarter ending December 31, 1865. Mr. Justice Strong said:

> Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Transportation of passengers is as much commerce as transportation of freight. (*People* v. *Compagnie Générale Transatlantique*, 107 U. S., 59, and cas. cit.)

By the "Act to facilitate commercial, postal, and military communication among the several States" of June 15, 1866, ch. 124, Congress expressly extended its powers over railroad companies as follows:

> Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore,
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, Government supplies, mails,

> freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the Government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road, or connection with any other road, without authority from the State in which said railroad or connection may be proposed.

This act is now incorporated in § 5258 of the Revised Statutes. In *Railroad Company* v. *Richmond* (19 Wall., 584, 589), referring to this act, and also to certain statutes authorizing the construction of railroad bridges, Mr. Justice Field said:

> These acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent the creation of such trammels in future, etc.

Referring to this and to other statutes in *Bowman* v. *Chicago & Northwestern Ry. Co.* (125 U. S., 465, 485), Mr. Justice Matthews said:

> So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively

> restricted by Congress itself, or by the States in particular cases by the express permission of Congress.

In *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (96 U. S., 1, 9), speaking of Congressional power over commerce and railroads, Chief Justice Waite said:

> The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.

In *Cherokee Nation* v. *Kansas Railway Co.* (135 U. S., 641, 657–8), a case arising under an act of 1884, whose validity was attacked, Mr. Justice Harlan said:

> The question is no longer an open one as to whether a railroad is a public highway established primarily for the conveniences of the people, and to subserve public ends, and therefore subject to Governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law. (Citing *California* v. *Pacific Railroad Co.*, 127 U. S., 1, 39.)

By the act of March 3, 1873, ch. 252 (Rev. St., §§ 4386-4390), Congress regulated the transportation of animals over railroads "whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another."

By the act of May 29, 1884, ch. 60, § 6, railroads were forbidden to receive for interstate transportation "any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia."

The Interstate Commerce acts (act of February 4, 1887, ch. 104; March 21, 889, ch. 382; and February 10, 1891, ch. 128) need scarcely be alluded to. Their provisions are familiar to the court.

§ 1 of the act of 1887 provides:

> That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property, wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment from one State * * * to any other State, etc.

Among the provisions of § 3 are the following:

> Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

§ 5, the well-known anti-pooling clause, prohibiting "any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads," etc., was enacted to prevent a certain kind of monopoly.

§ 7 makes unlawful "any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule," etc., "the carriage of freights from being continuous from the place of shipment to the place of destination," etc.

§ 16, as amended by the act of 1889, entrusted the enforcement of the act to the United States courts.

The Arbitration act of October 1, 1888, ch. 1063, is especially provided for interstate railroad companies.

> Whenever differences or controversies arise between railroad or other transportation companies engaged in the transportation of property or passengers between two or more States, etc. (§ 1.)

The act of March 2, 1893, ch. 196, need be referred to only by title: "An act to promote the safety of employees and travellers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes." This act vests the duty of enforcing its provisions on the Interstate Commerce Commission and United States district attorneys.

(3) The remedy, and the only efficient remedy, is in equity.

With a combination on so large a scale the common law and criminal law are inadequate to deal. Troops should not be called out as long as courts can afford relief. Equity, with its strong hand, can address its writ of injunction to the men at the center of the conspiracy. It is to be expected that its writ will be obeyed. If it is disobeyed, then the attachment for contempt follows. If this drastic remedy fails, then, and only then, should the military, under any ordinary circumstances, be appealed to.

It is not to be expected that any precedent precisely in point should be found. If precedents precisely in point were necessary for every exercise of equity jurisdiction, equity jurisprudence would never have grown to its present high estate. Many of its well-known rules date but from the present century. There is no precedent for the Debs strike itself.

In *Joy* v. *St. Louis* (138 U. S., 1, 50) Mr. Justice Blatchford said:

> It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.

Analogies for this injunction may be found. We refer first to the cases of—

Nuisance. We shall not attempt to set these out, as they have been cited so liberally in the opinion of Judge Woods. While they largely relate to obstructions of comparatively permanent character, yet they include also cases of obstructions of a temporary character, like many of those alleged in the present bill.

In *Texas, &c., Railway Co.* v. *Interstate Transorptation Co.* (155 U. S., 585) it was said that equity can enjoin the negligent management of tows, causing injury to a bridge.

A good instance of an injunction against the temporary obstruction of a public highway is that of *Gilman* v. *Callanan* (107 N. Y., 360). In that case the defendant was unreasonably obstructing the sidewalk by means of his "skid," which he used for loading and unloading goods between the street and his premises. The court held that while he might use a "skid" to some extent, he was doing it more than he had a right to, and therefore enjoined him. (See also *Kavanagh* v. *Mobile R. R. Co.*, 78 Ga., 803.)

In *Walker* v. *Brewster* (L. R., 5 Eq., 25), in 1867, Vice Chancellor Wood (afterwards Lord Chancellor Hatherley) enjoined certain musical entertainments held every Monday and Friday, partly because they collected a large crowd of improper people, who hung about the place, though not admitted to it—previous authorities to the same effect being discussed at length in the very intere-ting opinion.

In boycotting cases the analogy of nuisances has been carried still further.

In *Sherry* v. *Perkins* (147 Mass., 212), equity enjoined a boycotting scheme which was being carried out by means of banners with inscriptions warning against entering or continuing in the defendant's employ; yet this was a crime by statute.

In *Casey* v. *Cincinnati Typographical Union No.* 3 (45 Fed. Rep., 135) Judge Sage discusses the authorities at length and enjoins a boycott carried on by posters, handbills, &c.

In *Cœur d'Alene Mining Co.* v. *Miners' Union* (51 Fed. Rep., 260) Judge Beatty enjoins a boycott carried on by trespassing with force, threats, and intimidation.

In *Toledo, Ann Arbor and North Michigan Ry. Co.* v. *Pennsylvania Co.* (54 Fed. Rep., 730) Judges Taft and Ricks enjoin a boycott by mandatory injunction.

In *Arthur* v. *Oakes* 63 (Fed. Rep., 310) the circuit court of appeals for the seventh circuit, speaking by Mr. Justice Harlan, held that acts like those here in question could be enjoined on general principles of equity without reference to the Anti-Trust law or any other statute. (See also *Blindell* v. *Hagan*, 54 Fed. Rep., 40.)

In England the courts go so far as to enjoin libel (*Hill* v. *Hart Davies*, 21 Ch. Div., 798), or even slander (*Hermann Loog* v. *Bean*, 26 Ch. Div., 306). Both of these cases are cited with apparent approval by the Massachusetts court, *supra*. They may, perhaps, be regarded as erroneous here, but certainly not as altogether without jurisdiction, the particular acts complained of affecting property rights, as distinguished from mere personal attacks.

Recent well-known extensions of the right to enjoin were made in *Pollard* v. *Photograph Co.* (40 Ch. Div., 345), where the British chancery court enjoined the public sale of complainant's photographs; and in *Schuyler* v. *Curtis* (64 Hun., 594), where, at the suit of the family of a deceased lady, equity enjoined the public exhibition of her statue at the World's Fair. (See *Corliss* v. *Walker*, 64 Fed. Rep., 280.)

(4) The injunction is not too broad. Its very careful limitations will be noted.

It does not forbid a peaceful strike, nor does it forbid the exercise of all one's power of persuasion to induce others, for any lawful purpose, to institute a peaceful strike. The only persuasion specifically enjoined is persuasion of employees remaining in their employment not to do their duty. There can be no doubt that an employee must either work or quit, and that he can not both remain in the service and use his power thus retained to boycott outsiders against the command of his employers.

No other of the provisions of the first nine clauses of the injunction, as above subdivided, seem to need attention.

The tenth clause remains to be considered. This is a general command not to take part "in the furtherance of any conspiracy or combination" to restrain "the free and unhindered control and handling" of this interstate commerce, &c.

It is to be read in connection with the allegations of the bill, and with the other provisions of the injunction order and writ. It evidently should not be construed to cover the mere acts of striking and persuading others to strike, which are so carefully excluded from the seventh and eighth clauses. It is to be restricted, as it was clearly intended to be restricted, to acts in furtherance of the two unlawful purposes charged in the bill—the boycott and the attempted monopoly.

It was so construed by the court in the contempt proceeding, the petitioners being there charged primarily with continued commands to strike in aid of these two purposes,

and secondarily with responsibility for the various lawless outrages performed by their confederates, for which, by the law of conspiracy, they became jointly chargeable. (Authorities cited by Judge Woods, at page 764.)

E. *The Anti-Trust law of* 1890 *also authorizes this injunction.*

By this statute (Act of July 2, 1890, ch. 647, § 1):

> Every
> contract,
> combination in the form of trust *or otherwise*,
> or conspiracy
> in restraint of trade or commerce among the several States or with foreign nations

is "declared to be illegal," and made a misdemeanor on the part of every participant.

By § 2 the following persons are declared to be guilty of misdemeanors:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

By § 4 the following additional remedy is provided:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

The section provides that the proceeding *may* be by petition, but does not forbid its institution by bill of complaint, according to the general equity practice.

It has been argued that this act was not intended to cover combinations of "labor," but only to those similar to "trusts."

The act shows no internal evidence of intent to discriminate between combinations of so-called capitalists and combinations of so-called laborers. (See opinion of Judge Woods at pp. 754–5.) It shows no intent to make any discrimination among combinations and conspiracies, except between those for a lawful purpose and those for an unlawful purpose. Attempts to boycott and attempts to monopolize the labor market on a large scale were already familiar when the act was passed. If it had been intended to exclude them from its operation, it is presumable that such intent would in some way have been made manifest on the face of the act. Combinations of great capitalists are, indeed, more easily made than combinations of laborers on an equal scale; but if the latter combination is successful it is as deleterious to the public interests as the former.

It is also fallacious to speak of "capital" as something totally distinct from "labor" and bearing no part in this combination. The American Railway Union was doubtless backed by capital as well as by labor. No great strike can be maintained without considerable expenditure of capital on the part of the striking organizations. This capital being the savings of past labor, is similar in its origin to all other capital. Mr. Debs and the other officers of

the union doubtless received salaries and had a fund out of which to pay expenses, of which expenses the telegraphing bill alone must have been no small item. The difference between the General Managers' Association and the American Railway Union is not that one is all capital and one is all labor, but that the element of capital predominates in the one and that of labor in the other.

It is submitted that the Anti-Trust act, so far as it relates to interstate commerce, is a remedial act of great importance, and that it should be liberally construed in effectuation of its intent, which is the protection of that commerce from improper interference on anybody's part. If a narrow and technical interpretation is given to its provisions in favor of so-called labor, it is believed that this interpretation will tend to neutralize its effects as against conspiracies of so-called capital. Though the act is on one side penal as well as remedial, it is not necessary to give it a narrow construction. (*United States* v. *Lacher*, 134 U. S., 624, 628–9, and auth. cit.; *In re Coy*, 127 U. S., 731, 739.)

That the Anti-Trust act is valid, and that it applies to combinations of "labor" has been held by Judges Billings, McCormick, and Toulmin in *United States* v. *Working Men's Amalgamated Council*, 54 Fed. Rep., 994; 57 Id., 85; by Judges Thayer and Philips in *United States* v. *Elliott*, 62 Fed. Rep., 801; 64 Id., 27; by Judges Taft and Lurton in *In re Phelan*, 62 Id., 803, 821; by Judge Baker in *United States* v. *Agler*, 62 Id., 824; and by Judge Ross in his charge to the grand jury, 62 Id. 840.

Opposed to these is but a single *dictum* of Judge Putnam in *United States* v. *Patterson*, 55 Id., 605. The question was left undecided by the circuit court of appeals of the seventh circuit in *Arthur* v. *Oakes*, 63 Id., 310, because, as above stated, that court regarded the injunction as justified by general principles of equity without the aid of any statute.

It is respectfully submitted that this American Railway Union at the date of the injunction was described in three different clauses of the antitrust law. It was a combination "otherwise" than "in the form of a trust," "in restraint of trade or commerce among the several States;" it was a conspiracy to the same end; and it was a combination or conspiracy of persons "to monopolize" part—indeed, the larger part—of the trade and commerce among the several States.

As a *combination* under § 1 it is clearly included, unless the rule *ejusdem generis* be strictly applied for the purpose of confining the operation of this clause to combinations similar to "trusts," the latter being itself a term not used in its long settled legal definition. That the act is not to be given a restrictive interpretation we have already argued.

The word *conspiracy* is not affected by any words of description or qualification. The present case comes within the ordinary definitions of that word. We insert the following from among those quoted in Carson's Wright on Criminal Conspiracies, at pp. 110–11:

> A confederacy of two or more persons wrongfully to predjudice another in his property, person, or character, or to injure public trade, or to affect

public health, or to violate public policy, to obstruct public justice, or to do any act in itself illegal. (*Johnson* v. *State*, 2 Dutch., 313.)

As a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms criminal or unlawful because it is manifest that many acts are unlawful which are not punishable by indictment, &c. (*Commonwealth* v. *Hunt*, 4 Met., 111, *per* Shaw, C. J.; approved in *Pettibone* v. *United States*, 148 U. S., 197, 203.)

It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful—that is, amount to a civil wrong. (*Reg.* v. *Warburton*, L. R., 1 C. C., 274, *per* Cockburn, C. J.; quoted in 2 Bish. Crim. Law, § 178.)

A conspiracy is thus primarily simply a combination of two or more persons. A conspiracy is unlawful when its purpose is unlawful. This act therefore relates to all combinations of two or more persons for the purpose therein stated to be unlawful, namely, the restraint of interstate commerce.

Their *attempt to monopolize* also brings petitioners within the Anti-Trust law. Their main and ultimate purpose, as described in the bill and information, is plainly a monopoly as ordinarily understood by the bar and bench, as well as by economists and by the people at large. It has been often argued, with much force, that the word "monopolize"

is to be given a restrictive interpretation in this act, so as to make it equivalent to "monopolize by authority of a charter, patent, or other grant from the United States or from any State." This interpretation is based upon certain language of Lord Coke, in which he uses the word "monopoly" as equivalent to "grant of monopoly." (*In re Greene*, 52 Fed. Rep., 104.) This definition of Lord Coke's is discussed and analyzed and the history of the term given at some length in the brief filed on behalf of the Government in *United States* v. *E. C. Knight Co.* (156 U. S., 1); and it is there argued that Lord Coke's definition was erroneous when published, and has ever since remained erroneous, being contained in a volume which had not the benefit of his final personal revision. We shall not burden this brief with a repetition of the arguments there made.

It is respectfully submitted that whatever may be the definition of "monopolize" in this act, the definition must be something radically different from that given by Lord Coke. It would be extraordinary to suppose that Congress should pass a bill aimed only at grants made by itself or at attempts to procure such grants. If any attempt of this kind should be made in the future, and be successful, the grant thus obtained would repeal the Anti-Trust act *pro tanto*. Nor can this act be regarded as aimed at grants by the States. If the States should grant monopolies in the protection of interstate commerce, they would be void without the aid of this act. If the grants relate to matters which are left to the States by the Constitution, then Congress has no power to interfere with them.

(*United States* v. *E. C. Knight Co., supra.*) The Statute of Monopolies (21 Jac. I, ch. 3), in a commentary upon which Lord Coke's definition is contained, was an act of Parliament forbidding the granting of monopolies by royal charter, a condition of things not possible under our system of government.

Assuming, then, that the monopolies referred to in the Anti-Trust act are not monopolies by legislative or executive grant, and as the term has no other fixed legal definition, it remains to apply to them such other definitions as may be found in the books.

The following definition is given in Rapalje & Lawrence's Law Dictionary:

> The popular meaning of "monopoly" at the present day seems to be, the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity, or at some particular place or market, or of carrying on some particular business.

The Century Dictionary gives the following among its definitions of "monopoly:"

> 5. The possession or assumption of anything to the exclusion of other possessors; thus a man is popularly said to have a monopoly of any business of which he has acquired complete control.

And of "monopolize:"

> 2. To obtain or engross the whole of; obtain exclusive possession of.

It is in this sense that a nation is sometimes said to have a monopoly of some commodity; and in this sense the word

enters into the compound "anti-monopoly." The word is so used by Lord Bramwell in *Mogul S. S. Co.* v. *McGregor* (L. R. 1892, App. Cas., 25, 46).

Webster's 1890 edition gives among its definitions of "monopoly:"

> Sole command of the traffic in anything, however obtained; * * * a combination of traders may get a monopoly of a particular product.

We give his definition of "monopolize" in full:

> To acquire a monopoly of; to have or get the exclusive privilege or means of dealing in, or the exclusive possession of; to engross the whole of; as, to monopolize the coffee trade; to monopolize land.

In *United States* v. *E. C. Knight Co.*, *supra*, the effect of the Anti-Trust law is shown to be narrowly confined. It can not extend its protection into the domains of production, manufacture, or the internal commerce of any State.

The domain of interstate commerce, however, remains, and, as above argued, within that domain the act is entitled to a fair and liberal interpretation in effectuation of its object.

F. *The Anti-Trust law is constitutional* within the limits defined. This follows from the arguments already set forth. It violates no principle of law. In its equity features it is declaratory. In its criminal features it but establishes in Federal legislation a criminal jurisdiction recognized by the weight of authority to have belonged to the common law.

In its civil features it is analogous in principle to the anti-pooling clauses of the interstate commerce act, whose

validity is undoubted; and in its criminal features it is analogous to anti-monopoly statutes of various States, such as that discussed in *People* v. *Sheldon* (139 N. Y., 251).

A conspiracy is a *quasi* contract, and the words of Mr. Justice Brewer, in *Frisbie* v. *United States*, decided March 18, 1895, are applicable:

> It is within the undoubted power of Government to restrain some individuals from all contracts as well as all individuals from some contracts. It * * * may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by Government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.

III.

Sundry technical objections raised by petitioners are answered by Judge Woods in his opinion (pp. 738–9, 755–6).

They are not further discussed here, as they raise no jurisdictional questions, but amount only to charges of error.

It is respectfully submitted that the petition for a writ of *habeas corpus* should be dismissed.

RICHARD OLNEY,
Attorney General.
EDWARD B. WHITNEY,
Assistant Attorney General.

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Office Supreme Court, U. S.
FILED.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1894.

NO. 11, ORIGINAL.

EX PARTE:

IN THE MATTER OF EUGENE V. DEBS et al.

PETITION FOR A WRIT OF HABEAS CORPUS.

BRIEF ON BEHALF OF THE GOVERNMENT

BY

EDWIN WALKER,
SPECIAL ASST. U. S. ATTY.

THE GUNTHORP-WARREN PRINTING COMPANY, 53 DEARBORN ST., CHICAGO.

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PETITION FOR A WRIT OF HABEAS CORPUS.

STATEMENT OF THE CASE.

On the 2d day of July, 1894, by direction of the attorney general, a bill of complaint was filed in the Circuit Court of the United States for the Northern district of Illinois, against Eugene V. Debs and others, for writ of injunction, and the usual prayer for relief.

The bill charges that the Atchison, Topeka and Santa Fe Railroad Company, and other railroad companies named in the bill, were corporations duly created by, and existing under the laws of the several states, for the purpose of conducting the business of common carriers of passengers and freight generally, between the states of Illinois, Indiana, Michigan and other states; that the aggregate

length of the railroads owned and operated by said companies, exceeds 120,000 miles, and that each of said railroads extends into two or more different states, and were "engaged in the general transportation of passengers and "freight between and among the different states, and subject to the requirements of act of congress, approved February, 1887, known as the inter-state commerce act, and the several amendments thereof, subject "to each and all of the laws of the United States, and "acts of congress relating to inter-state commerce; that "the number of passengers annually carried by said railroads in the course of, and as a part of inter-state commerce, into the city of Chicago from other states than "Illinois, and out of Chicago into other states than Illinois, is more than 12,000,000," and that the inter-state commerce freight amounted to many million tons; also that "each of said railroad companies was required "by the United States, and under obligation through the "laws of the United States, to carry regularly and daily, "upon numerous trains, the mails of the United States, "and that each of said railroads is under contract with "the United States to so continuously and daily upon its "regular trains, carry the mails on stated terms, and for "a long period thereafter to ensue"; that under said contracts and laws, said railroad companies and each of them were required "to carry the mails as aforesaid at definite "hours of the day and night, having a definite hour of starting, and within a definite time fixed by such contract for "the delivery of the mails; that all of said railroads are, "and at all times hereinafter mentioned were, by statute of "the United States, post-roads of the government, and "many of said railroads were required by act of congress "of the United States at any and all times to carry troops

"and military forces of the United States, and provisions, "munitions and general supplies therefor;" that in the City of Chicago many and most extensive industries necessary for the support and welfare of its people, and requisite for and most intimately connected with the business and welfare of the country, were prosecuted and carried on, and that large quantities of agricultural and food products were, and necessarily must be distributed by means of said railroads, among the people of the several states.

The bill further charges that, if the inter-state transportation of passengers and freight upon their lines of railroad should be permitted to be materially interfered with or hindered by the defendants, or any other persons, or in any other way whatsoever, then and in such event the general inter-state business and commerce, in which the people of Chicago and vicinity, and of the other states and places of the United States are engaged, will necessarily cease, and such inter-state business would necessarily come to an end. "That the products, natural and manu- "factured, of the states through and into which the said "several railways are operated, and which enter into and "constitute the sum of inter-state trade and traffic be- "tween the said several states will, unless the acts and "doings hereinafter more particularly described are pre- "vented and restrained, cease to enter into and form a "part of such commerce, and the people of said several "states will be prevented from dealing in said articles, "natural or manufactured, or in the great branches of "inter-state commerce relating to such articles."

The bill further charges that Eugene V. Debs was the president, and other defendants were officers of the American Railway Union.

"That in the month of May, 1894, there arose some "difference or dispute between the Pullman Palace Car "Company, a corporation engaged in the manufacture of "railroad cars, and its employes, at the town of Pullman "in the State of Illinois, and that the result of such dispute "was that said employes, or a considerable portion of "them, left the service of the Pullman Palace Car Com- "pany. That thereafter, the defendants and other mem- "bers of the American Railway Union, combining "together and with others to your orator unknown, with "the purpose of compelling an adjustment of the said "difference and dispute between the said Pullman Com- "pany and its employes, caused to be given out through "the newspapers of Chicago, generally, that the said "American Railway Union would at once create a boy- "cott against the cars manufactured by said Pullman "Palace Car Company, and that in order to make the "said boycott effective, the members of said American "Railway Union, many of them employed as trainmen, "switchmen or otherwise, in the service of said railroads, "would be directed to refuse to perform their usual duties "for such railroad companies, in case said railroad com- "panies thereafter attempted to haul said Pullman sleeping "cars;" and that said defendants had already prevented divers of said railroad companies from operating their trains, and that they proposed and threatened, and conspired together, for the purpose of extending such proposed boy- cott against the Pullman sleeping cars, until such boycott should embrace all the lines of railroads operated in the several states, by the aforesaid companies. That said defendants entered into said conspiracy with the intent, and for the purpose of preventing said railroad companies, and each of them from performing its duties as a com-

mon carrier, and for the purpose of injuring and obstructing the regular and customary transportation of passengers and freight between and among the states traversed by said lines of railway; that for the purpose of making said boycott effective, said defendants did further conspire and combine together to induce the trainmen, switchmen and other employes of said railway companies, who were members of the said American Railway Union, to leave the service of said company, and did further conspire and combine together to prevent said railway companies from securing other persons to take the places of such of their said employes as by reason of such inducements, should leave the service of said railway companies.

The bill further charges that, "the said Debs, and "other officers and directors of said American Railway "Union, in pursuance of said unlawful purpose and "conspiracy, did issue and promulgate, and cause to be "issued and promulgated, certain orders, requests, notifications and instructions to the members of said "American Railway Union, to leave the service of said "companies, and to prevent the said companies from "operating not only their passenger and mail trains, but "all other trains operated by said companies." That said defendants asserted, and continued to assert, that they could and would tie up, paralyze and break down any and every railway company that refused to accede to their demands, and that it was the purpose and intention of the defendants so conspiring and combining together, to so obstruct and cripple the business of said companies as to prevent them from performing their duties as common carriers between and among the several states, and their obligations as such to the public.

The bill further charges that, "the defendants aimed "and intended, and do now aim and intend, in and by the "said conspiracy and combination, to secure unto them- "selves, the entire control of the inter-state industrial "and commercial business between the citizens of the "different states; and in pursuance of said conspiracy, "issued or caused to be issued, orders and directions to "the several employes of said railroad companies, and "that in pursuance of such orders, said employes threat- "ened to quit the service of said railroad companies with "the common purpose of preventing said companies from "transporting the United States mails, and from carrying "on or conducting their duties as common carriers of "inter-state commerce."

The bill further charges that in pursuance of said combination and conspiracy, and under the direction "as "aforesaid of said officers and directors of said American "Railway Union, said other defendants, and other per- "sons whose names are unknown, proceeded by collect- "ing together in large numbers, by threats, intimidation, "force and violence, at the station grounds, yards and "right of way of said railroad companies, respectively, "in the State of Illinois, to prevent said railroad com- "panies from employing other persons to fill the "vacancies aforesaid"; and to prevent other railway employes remaining in such railway service, from performing the duties of such service. That "in pursuance "of said combination and conspiracy, acting under the "direction of said defendants and other officers and direct- "ors of said American Railway Union, said defendants, "did with force and violence at divers times and places "within the State of Illinois and elsewhere, stop, obstruct, "derail and wreck the engines and trains of said railroad

"companies, then and there engaged in inter-state com-
"merce, and in transporting the United States mails."

The bill further charges that by reason of said unlawful combination and conspiracy, and the acts and doings aforesaid thereunder, "the supply of coal and fuel for "consumption throughout the different states of the "union, and of grain, bread-stuffs, vegetables, fruits, "meats and other necessaries of life, has been cut off, inter-"rupted and interfered with, and the market therefor made "largely unavailable, and dealers in all of said various pro-"ducts, and the consumers thereof, have been greatly in-"jured, and trade and commerce therein among the states "has been restrained, obstructed and largely destroyed."

It is further charged that the said defendants, Debs, Howard, Keliher, Rogers and other officers of said Railway Union, and others whose names are unknown, "threaten, declare, publish and announce that they will "continue in their said illegal acts and doings, and will "still further restrain, obstruct and interfere with trans-"portation, trade and commerce among the states, as "hereinbefore set forth." That they also "threaten, "declare, publish and announce, as officers of said "American Railway Union, that they will cause the em-"ployes in other lines of service of railway companies to "quit the service of said railroad companies, in further-"ance of said unlawful combination and conspiracy, and "also to cause the employes of other railroad companies "in the United States, other than those hereinbefore "mentioned, to quit the service of said companies, and "also to cause the employes of other individuals and cor-"porations to leave the service of such corporations," all in furtherance and in pursuance of the unlawful combination and conspiracy hereinbefore set forth. That said

defendants "threaten, announce, publish and declare that "they can, and will, if necessary to carry out the said "unlawful combination and conspiracy above set forth, "tie up and paralyze the operations of every railway in "the United States, and the business and industries de- "pendent thereon."

Prayer for writ of injunction directed to the defendants Eugene V. Debs and others, and "all persons whose "names are to your orators unknown, combining and con- "spiring with them, and to all other persons whomsoever, "commanding and enjoining them absolutely to desist "and refrain from in any way or manner interfering with, "hindering, obstructing or stopping any of the business "of any of the following named railroads, to wit:

"Atchison, Topeka & Sante Fe railroad," (and other companies named) "from in any way or manner interfer- "ing with, hindering, obstructing or stopping any mail "trains, express trains or other trains, whether freight or "passenger, engaged in inter-state commerce, or carrying "passengers or freight between or among the states, and "from in any manner interfering with, hindering or "stopping any train carrying the mail."

On the 2d day of July, A. D. 1894, the bill of complaint, duly verified, was presented by the district attorney to the Circuit and District Judges sitting together, and the motion was entered for a writ of injunction in accordance with the prayer of the bill.

After hearing and due consideration, the court ordered that a writ of injunction should be issued out of and under seal of the court, commanding the said defendants, Eugene V. Debs and others, and all persons combining and conspiring with them, to absolutely desist and refrain from in any manner interfering with, hindering, obstruct-

ing or stopping any of the business of any of said railroads named in the bill, as common carriers of passengers and freight between or among any of the states, and from in any manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains, whether freight or passenger, engaged in inter-state commerce, or carrying passengers or freight between or among the states; "and from in any manner interfering with, "hindering, or stopping any trains carrying the mail, "also from interfering with, hindering, obstructing, or "stopping any engines, cars, or rolling stock of any of "said companies engaged in inter-state commerce, in con- "nection with the carriage of passengers or freight be- "tween or among the states, and from in any manner in- "terfering with, injuring, or destroying any of the prop- "erty of any of said railroads engaged in or for the "purpose of, or in connection with inter-state commerce "or the carriage of mails of the United States, or the "transportation of passengers or freight between or "among the states."

The defendants were also enjoined from "compelling "or inducing, or attempting to compel or induce by "threats, intimidation, persuasion, force or violence any "of the employes of any of said railroads to refuse or "fail to perform any of their duties as employes of said "railroads in connection with the inter-state business or "commerce of such railroads, or carriage of the United "States mails by such railroads. Also from compelling "or inducing, or attempting to compel or induce by "threats, intimidation, force, or violence, any of the em- "ployes of said railroads who were employed by said "railroads and engaged in its service in the conduct of "inter-state business or in the operation of any of its

"trains, carrying the mail of the United States, or doing "inter-state business, or the transportation of passengers "and freight between and among the states, to leave the "service of such railroads. Also from preventing any "person or persons whatever, by threats, intimidation, "force or violence, from entering the service of said "railroads and doing the work thereof in carrying the "mails of the United States, or the transportation of "passengers and freights between and among the states, "and from ordering, directing, aiding, assisting, or "abetting in any manner whatever any person or persons "to commit any or either of the acts aforesaid."

Copies of the writ of injunction were duly served upon the several defendants.

On the 17th day of July, 1894, the government filed in said cause, its information, duly verified, charging the defendants with willful and repeated violations of said order of injunction, and moved that a rule be entered against the defendants, requiring them to show cause why they should not be attached for contempt.

The defendants entered their appearance to the rule, filed their answers to the information, and the matter was set for hearing September 5th. The hearing was concluded on September 28th, and taken under advisement.

On the 14th day of December, the court entered its order, adjudging the defendants guilty of contempt in disobeying and wilfully violating the order of injunction entered in said cause on the 2d day of July, 1894, and that they be confined and imprisoned in the county jail of Cook County, Illinois.

Thereafter, and during the present term of this court, the defendants, by counsel, entered their motion, and

upon leave being granted, filed their petition for the writ of *habeas corpus*.

The petition charges that the petitioners are unjustly and unlawfully detained and imprisoned, by the marshal of the United States for the Northern district of Illinois, and that such imprisonment is contrary to the constitution of the United States, and that they are restrained of their liberty, in violation of the constitution and laws of the United States.

It charges:

First. That the petitioners were tried on the charge, by the court, for violating the injunction, without a jury, and not under indictment of the grand jury, and that such trial was contrary to the fifth and sixth amendments of the constitution of the United States.

Second. That the order for said injunction was void, in that the bill did not state a case in which the said Circuit Court of the United States could take jurisdiction, or in which said court could make any lawful order against the petitioners: that said bill was, in effect, a bill by the government of the United States to maintain the public peace, and to enjoin the violations of the penal code of the United States.

Third. That the Circuit Court sustained and upheld its jurisdiction under section 4 of an act of Congress, entitled, "An Act to protect trade and commerce against "unlawful restraints and monopolies": that said section of said act confers no jurisdiction whatever upon Circuit Courts of the United States, "in respect of the matters "and things in said bill set forth, and that said section "of said act is unconstitutional and void."

BRIEF AND AUTHORITIES.

The only question presented by the petition is whether the Circuit Court sitting as a court of equity had jurisdiction to make the order under which the petitioners are held by the marshal. Had the Circuit Court jurisdiction of the subject-matter, and has the government the right to seek relief in a court of equity?

The petitioners challenge the jurisdiction of the court, and insist that the bill does not present a case entitling the government to relief in equity. If, therefore, the bill itself, without reference to the subsequent proceedings, presents a case within the jurisdiction of the Circuit Court, we assume that the petition will be denied, and that no other alleged error will be considered.

The sole purpose and object of the government, under the bill, was to invoke the aid of a court of equity for the protection of the transportation of the United States mails and inter-state commerce. No other relief was sought, and no aid granted other than such protection.

The bill charges that on the 2d day of July, the defendants entered into a conspiracy, for the purpose of boycotting the Pullman cars, and that to effectuate such boycott, they threatened to "tie up" and paralyze the operation of all the railroads named in the bill, together with all other roads in the United States, wherever located and operated, that should attempt to run, or use any of the so-called Pullman cars, and that the effect of such boycott and conspiracy would be to obstruct, delay and prevent the transportation of either inter-state commerce

or the United States mails by either of said railroad companies. That at the time of the filing of the bill, upon some of the roads named, there was then an obstruction and a hindrance to such transportation, and that the defendants threatened to extend their unlawful conspiracy until every railway in the United States should become involved, and that the result of such conspiracy would be the absolute suspension of the business and operation of all of said railways. It was to prevent this, and to enable the government to perform one of its most important functions that the aid of a court of equity was sought. The government did not seek to enjoin the boycott of the Pullman cars, nor to restrain the defendants from interfering with the ordinary business of the railways, save and except so far as such conspiracy injured and prejudiced the rights of the public in the daily transportation of the mails, and inter-state commerce.

The rights of the railway employes were not affected, and certainly no attempt was made to restrain such employes in the exercise of their lawful rights.

It is not denied that the employes of the several railways named in the bill, of, or other railways engaged in the transportation of the United States mails, or of inter-state commerce, had the right to leave the service of such railways, either singly or collectively, if they so desired, but it is denied that such employes have the lawful right to enter into a combination or conspiracy to hinder, embarrass or prevent the railways in the discharge of their duties to the public, or by concerted action, either with or without violence, to compel the suspension of the ordinary and usual operations of the railways, and that whenever it is made to appear that the result of such unlawful conspiracy will be to suspend the transportation of the

United States mails, it is not only the lawful right, but it becomes the duty of the government to invoke the aid of equity for the protection of its property rights, as well as the discharge of its duty to the public.

The bill charges that the several railway companies named, operate an aggregate of 120,000 miles of railway, then engaged in general transportation of passengers and freight, between and among different states, subject to the provisions and requirements of the acts of congress approved February 4, 1887, known as the Inter-State Commerce Act, and the several amendments thereof, and additions thereto; also that each and all of said railways were employed, and required by the United States, and under obligations under the laws of the United States, to carry regularly and daily, upon their numerous trains, the United States mails; also that the defendants, as officers and directors of the American Railway Union, had entered into a combination and conspiracy, for the purpose of preventing said railway companies, and each of them, from operating their trains engaged in such interstate commerce, and in the transportation of the mails.

It can hardly be denied that equity has jurisdiction of the subject-matter of the bill. Either of the railways could have applied to any court of equity having jurisdiction of the parties, for an order restraining the defendants from any unlawful interference with the trains, or with the proper discharge of their ordinary functions, but it is claimed that the government under the bill has no standing in equity for any relief whatever.

We do not claim that a court of chancery has any jurisdiction over criminal matters. If the conspiracy charged in the bill is a criminal conspiracy the punishment of that offense will be left to the domain of the

courts of common law, but equity has jurisdiction to restrain, and the Circuit Court did restrain the petitioners from doing the threatened overt acts in pursuance or furtherance of such conspiracy.

The government may rest its claim of jurisdiction upon the following propositions:

a. The United States may invoke the aid of equity to restrain a threatened public nuisance.

b. The Circuit Court had jurisdiction under the bill to restrain the defendants from unlawful interference with, or obstruction to the transportation of inter-state commerce.

c. The court had also jurisdiction to enjoin and restrain the defendants from hindering, obstructing and preventing the transportation of the United States mails.

Each of these propositions were submitted to, and carefully considered by the learned Circuit Judge, in a most exhaustive opinion, reported in 64 Fed. Rep. (January 22, 1895), page 724.

The judgment of the court was reached after full argument of the counsel of the respective parties, and the presentation of all authorities within reach of counsel, both in support of, and against the claim of jurisdiction.

Relative to the first proposition, we assume that it will be admitted by petitioners' counsel, in this court as it was in the Circuit Court, that equity has jurisdiction to restrain or prevent a public nuisance, but it will be insisted that the government cannot be the moving party for such relief; that there is no authority, either by statute or precedent, for such procedure; that until congress has taken affirmative action the Federal courts are without jurisdiction.

The principal, if not the only contention of petitioners' counsel, in the Circuit Court, was that there was no authority whatever for the intervention of the government for the protection of the transportation of inter-state commerce, and that, therefore, in that behalf, the court had no possible jurisdiction.

There was little, if any discussion, of the right of the government to invoke the aid of equity for its protection in the transportation of the mails, while our contention was, and still is, that the Circuit Court had full jurisdiction under the bill, to grant the relief invoked by the government, for the protection of the rights of the public in the transportation of inter-state commerce, as well as the United States mails.

II.

HAS EQUITY JURISDICTION TO RESTRAIN PUBLIC NUISANCES UPON BILL OR INFORMATION FILED BY THE ATTORNEY GENERAL ON BEHALF OF THE PEOPLE?

Blackstone defines a nuisance to be:

"Anything that worketh hurt, inconvenience or damage."

3 Blackstone Com., 216.

"A public nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person."

4 Blackstone Com., 166.

"A public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires and which it is the duty of a person to do,

and the omission to do which results injuriously to the public."

Wood on Nuisances, p. 38. (3d Ed.)

The bill certainly charges a threatened violation of a public right, for it must be conceded that the free and unobstructed transportation of inter-state commerce, as well as the mails, is a right which pertains to the entire public, and the violation of such right would tend to a common injury in which all the public share.

It is also an elementary proposition that the jurisdiction of equity may be invoked by the attorney general of a state to enjoin a public nuisance, without express statutory authority, and the fact that the commission of the threatened act may be punished criminally, will not prevent the exercise of the restraining power of equity.

High on Injunctions, Sections 745–1570.

This rule was announced and upheld by the Supreme Court of the State of Illinois as early as 1848, in the case of *The People of the State of Illinois* v. *The City of St. Louis et al.*, 5 Gilm., 351. This was a bill in chancery for an injunction to restrain the City of St. Louis, a public corporation situated in the State of Missouri, through her agents, from obstructing the channel of the Mississippi river.

In this case the defendants rested their defense in part upon the plea of want of jurisdiction, and also that there was no statutory or other authority for the support of the bill. The answer to the last contention was, that the court would not refuse to interfere merely because it was a case of first impression, if there was a wrong sufficiently established to show the necessity of preventive remedy

The justices of the Supreme Court at that early date were Samuel H. Treat, John D. Caton and Lyman Trumbull. Justice CATON, speaking for the court, said:

"The question of jurisdiction may be disposed of in a few words. Independent of any statutory provision, the state as a political corporation, has a right to institute a suit in any of her courts, whether it be required by her pecuniary interests, or the general public welfare demand it. * * * The jurisdiction over the subject-matter of the suit was also undoubted. The court of chancery may grant preventive as well as remedial relief, and this may be done where the act threatened would be punishable under the criminal laws as a nuisance."

The decree of the Circuit Court was reversed, and a decree was entered by the Supreme Court, making the injunction perpetual.

It may be that the jurisdiction of the Federal Circuit Court should be limited to constitutional or statutory authority; nevertheless, it is apparent that the general public could nowhere obtain remedial relief, except in the Federal courts. This court has so often held that interstate commerce is not a subject of jurisdiction of state courts, or state legislation, that it is no longer an open question.

It may be claimed, however, that in the case *supra*, jurisdiction of the court could be maintained by reason of the proprietary interest of the State to the soil underlying the waters of the Mississippi river, but this case was approved by the Supreme Court of the State of Illinois, in a later case, in which no property interest was involved.

The People of the State of Illinois v. *Craig*, 47 Ill., 487, was a proceeding in equity by the state's attorney in behalf of the people to enjoin and restrain the defend-

ant from enclosing or interfering with the free use of a public road.

Chief Justice BREESE concluded his opinion, tersely and forcibly, as follows:

"Now, as to the remedy by injunction. It is true, an action at law would lie against these appellants, should they obstruct the road, and also for continuing the obstruction after notice to remove it. But this remedy, on the facts before us, would not only be tardy, but wholly inadequate. Intercourse between the settled portions of the county and the county seat would be almost wholly interrupted, the citizens put to great inconvenience, and injuries inflicted, which, though in particular cases might be trifling, yet in the aggregate would be too grevious to be borne. It would be a monstrous public nuisance, to prevent which full power is lodged in a court of chancery, by calling into exercise its restraining power. With that powerful arm the whole wrong can be at once grasped, and the injury prevented. It is the most effective remedy. *Green* v. *Oakes*, 17 Ill., 249. And, as this court said in the case of *The People* v. *The City of St. Louis*, 5 Gilm., 373, which was an attempt to obstruct the eastern channel of the Mississippi river, in this state, by the authorities of St. Louis, that the chancellor had no discretion to refuse the injunction, but was bound to grant it, as the nuisance could never be abated, and the public rights to that channel could never afterwards be enjoyed. It is true, the nuisance here threatened is not of that permanent character as the proposed closing of the channel of the Mississippi river, though those obstructions could be removed and the channel again opened, but the principle is that any acts of the character here indicated, by which the public may be put to great expense and exposed to much injury, parties doing them, or threatening them, may be restrained by injunction."

At the hearing in the Circuit Court, counsel for petitioners broadly asserted that:

"The bill brought by the United States shows no case cognizable in equity. It cannot be maintained on general principles of equity, irrespective of the anti-monopoly act of July 2, 1890."

Counsel evidently ignored elementary, as well as judicial authority. This objection does not go to the parties, but on the contrary, to the subject-matter; and it is asserted that courts of equity have no jurisdiction over the subject-matter of the action.

In Story's Eq. Jur., Sec. 921, the author says:

"In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date. The jurisdiction is applicable not only to public nuisances, strictly so-called, but also to purprestures upon public rights and property."

Also Sec. 923:

"In cases of public nuisances, properly so-called, an indictment lies to abate them, and to punish the offenders, but an information also lies in equity to redeem the grievances by way of an injunction."

Sec. 924:

"The ground of this jurisdiction of courts of equity, in cases of purprestures, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation. In the first place, they can interpose where the courts of law cannot, to restrain and prevent such nuisances which are threatened, or are in progress, as well as to abate those already existing. In the next place, by perpetual injunction, the remedy is made complete through all future time."

The same rule is found in Pomeroy's Eq. Jur., Sec. 1,349:

"A court of equity has jurisdiction to restrain existing or threatened nuisances by injunction, at the suit of the attorney general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth in this country."

Also 2d Daniell's Ch., 5th Ed., p. 1,636:

"In cases of public nuisance, properly so-called, an indictment lies to abate them, and to prosecute the offender;

but an information will also lie in equity to stop the mischief, and to restrain the continuance of it."

Attorney-General v. *Nichol*, 16 Ves., 338.
Attorney-General v. *Forbes*, 2 M. & C., 123.
Attorney-General v. *Cambridge Consumers' Gas Co.*, L. R., 6 Eq., 282.
Bunnell's Appeal, 69 Pa. St., 59.

Circuit Judge Woods, in his exhaustive opinion, reviews the authorities, and maintained jurisdiction both of the parties and subject-matter, and as authority cites the case of *Mayor of Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91–98. This was a bill in equity with a prayer for injunction, restraining the defendants from obstructing the navigation in the Potomac river.

On page 98, the court says:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisances, by an information filed by the attorney general. This jurisdiction seems to have been acted upon with caution and hesitancy. * * * Yet the jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly, the instances where it is exercised are rare, yet it may be exercised in those cases in which there is eminent danger of irreparable mischief before the tardiness of the law can reach it."

Also in *State of Pennsylvania* v. *Wheeling Bridge Co.*, 13 Howard, 520, it is held that,

"in case of a nuisance, the injured party may claim the extraordinary protection of a court of chancery."

Again, on page 563,

"in this second section of the third article of the constitution, it is declared, 'the judicial power shall extend to

all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority.' Chancery jurisdiction is conferred on the courts of the United States with the limitation 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law. The rules of the High Courts of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court.

In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usage of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

Lord Cottenham, lord chancellor of England, as early as 1833, speaking of the exercise of equitable jurisdiction, said:

"I have before taken occasion to observe that I thought it the duty of this court to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men, must continually arise, and not, from too strict adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights, for which there is no other remedy."

Under the authorities, we do not think that the jurisdiction of the Circuit Court, over the subject-matter, can be successfully challenged.

III.

HAD THE CIRCUIT COURT JURISDICTION UNDER THE BILL TO RESTRAIN THE DEFENDANTS FROM UNLAWFUL INTERFERENCE WITH, OR OBSTRUCTION TO THE TRANSPORTATION OF INTER-STATE COMMERCE?

The bill was filed in the name of the United States by direction of the attorney general to restrain threatened injury to the rights of the general public. It charges that the defendants had given out, and made public proclamation, that they would by unlawful combination and violence impede, obstruct, and prevent the transportation of inter-state commerce unless the railway companies submitted to the demand of the American Railway Union and its directors, of boycott of certain cars of particular manufacture, and ownership. At the time of filing the bill, in pursuance of the orders of these petitioners, the transportation of inter-state commerce and United States mails upon several of the railways was practically suspended, and the petitioners, as officers of the American Railway Union, threatened to extend the boycott until an embargo should be practically placed upon the transportation of both freight and passengers upon all the railways throughout the country. In other words, the threat was, that they would paralyze all the railways, and prevent and prohibit the movement of all trains.

The injury to public interests and public rights, by reason of this prohibition, is not denied, but the petitioners at the hearing denied, and now deny the right of the government to invoke the aid of equity for the protection of public rights and interests. It is insisted that the United States has no right to appeal to chancery

in aid of public commerce, or for any other purpose except for the protection of property rights of the government, or in pursuance of express authority of congress.

It was admitted that,

"were congress to declare that the United States might maintain a bill to enjoin the obstruction of inter-state commerce on railroads engaged therein, where such obstruction amounted to what, on a public highway, would be a public nuisance, such legislation would be admissible. No such act has been passed, and the proposition now under discussion, is whether in the absence of legislation, such an action will lie."

The principal authority cited by petitioners' counsel, in support of this proposition, was *Transportation Co.* v. *Parkersburg*, 107 U. S., 691-700. Mr. Justice BRADLEY, speaking for the court, said:

"Until congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject."

The matter under discussion and consideration, was the right of the City of Parkersburg, to demand wharfage charges of the owners of several steamboats, for the use of a wharf built and owned by the City of Parkersburg. The court held that,

"although wharves are related to commerce and navigation as aids and convenience, yet being local in their nature and requiring special regulation at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belongs to the states in which they are situated."

There had been no congressional legislation upon this particular subject and therefore, the court declined to take jurisdiction. The court, however, further held that there are cases

"which are so national in their character, and in which it is so essential that a general or national rule should exist, that any interference by the state legislature therewith is justly deemed to be an invasion of the power and authority of the general government; and in such cases, the courts will interpose to prevent or redress the commission of acts done, or attempted to be done, under the authority of such unconstitutional laws. In such cases, the non-action or silence of congress will be deemed tobe an indication of its will that no exaction or restraint shall be imposed."

A material question, therefore, is, what action has congress taken upon the subject of inter-state commerce by railways? If congress has taken action, and by statutory enactment has constituted governmental agencies for the regulation and control of inter-state commerce upon railways, such action would confer upon the courts of the nation jurisdiction to enforce the will of congress, without any special provision or direction as to the character of the proceedings that might be commenced by the government. If, in the opinion of the Attorney General, it should be deemed necessary or advisable to invoke the aid of equity in the name of the United States, for the protection of the public interest in inter-state commerce, direct and statutory authority for such procedure is wholly unnecessary.

State of Pennsylvania v. *The Wheeling Bridge Co. et al.*, *supra*, was a proceeding in equity to enjoin the defendants from building a bridge. In that case it was objected, as a matter going to the jurisdiction of the court, and as fatal to any further action, that there was no statutory

provision to guide the court. But the court held that direct authority need not be given by congress, authorizing the government, or the Attorney General to file bills or informations in equity for the purpose of abating or preventing public nuisances; also that property interests were not necessary for the maintenance of this jurisdiction; that the bare fact that congress had provided for licenses, etc., was evidence that congress had taken control over the navigation of rivers as public highways. And it was further held that courts of equity need not look to any specific authority from congress, but to the chancery powers of courts of equity as established in England.

At that date, (1851) the navigable rivers were the great highways of the country for the transportation of interstate commerce, and it was held that under the constitution, congress had the exclusive control over such commerce, and had taken action upon the matter by the enactment of a law requiring pilots to take out government licenses.

On page 565, it is further said:

"Congress have not declared in terms that a state, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties by which damage to life or property has resulted."

Chief Justice TANEY did not concur in the judgment of the court, but upheld the jurisdiction of the court, and its power to abate public nuisances. On page 590, he said:

"I do not doubt the power of the court of chancery to abate a public nuisance upon an information of chancery to which the attorney general is a party. And even in a case of that kind, there must be danger of irreparable

mischief before the tardiness of the law can reach it. This is the doctrine of this court in the case of the *City of Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 98."

Mayor, etc., v. *Alexandria Canal Co. et al.*, *supra*:

A bill was filed by the corporation of Georgetown, on behalf of themselves and the citizens of Georgetown, against the Alexandria Canal Company, charging that said company was constructing an acqueduct across the Potomac river. The defendants claimed authority under their charter granted by congress. The court denied the relief, holding

"that in case of a public nuisance, where a bill is filed by a private person asking for relief by way of prevention, the plaintiff cannot maintain a stand in court of equity unless he avers and proves some special injury."

The element of special injury not having been established by the proof, the injunction was denied.

The court further held that for the prevention of public injury relief would be granted by chancery on bill ~~of~~ or information filed by the attorney general. Upon this proposition the court said:

"Were it even admitted that the Canal Company had exceeded the authority under which they are acting, nevertheless, as the Potomac river is a navigable stream, a part of the *jus publicum*, any obstruction to its navigation would, upon the most established principles, be what is declared by law to be, a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage, because to that extent he has suffered beyond his portion of injury in common with the community at large. (5 Bac. Abr. Nuisance, B. p. 51; 2 Lord Raym, 1,163.)

Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney general. This jurisdiction seems to have been acted on with great caution and hesitancy. Thus, it is said by the chancellor (in 18 Ves., 217) that the instances of the interposition of the court were confined and rare. He referred, as the principal authority on the subject, to what had been done in the court of exchequer, upon the discussion of the right of the attorney-general by some species of information to seek on the equitable side of the court, relief as to nuisance and preventive relief."

The extent of the power conferred upon congress to regulate commerce received its first construction by Chief Justice MARSHALL, "the great expounder of the consti-"tution," in *Gibbons* v. *Ogden*, 9 Wheaton, p. 1. On page 189 the Chief Justice says:

"We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. The words are, 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for appellee would limit it to traffic, to buying and selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

On page 196:

"We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself,

may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The cause came to this court on a transcript of the record of the court for the trial of Impeachments and Correction of Errors, of the State of New York. Ogden claimed the exclusive right to navigate all the waters within the jurisdiction of the State of New York, under several acts of the legislature, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton, such exclusive right, and filed his bill praying an injunction to restrain Gibbons from using his boats, or any others propelled by fire or steam, in navigating the waters within the territory of New York. The injunction was granted and made perpetual.

Gibbons claimed the right of free and uninterrupted navigation of the Hudson river, under authority of the act of congress, entitled "An Act for the Enrolling and Licensing of Boats."

This court held that

"so much of the several laws of the State of New York as prohibits vessels licensed according to the laws of the United States from navigating the waters of the State of New York by means of fire or steam, is repugnant to the constitution and void."

The power of congress to regulate commerce, and the necessity and extent of its action regulating the same, as preliminary to the jurisdiction of equity, was considered in *Gilman* v. *Philadelphia*, 3 Wall., 713.

On pp. 726, 27, the court said:

"The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions

suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states."

The court further says that,

"in the Wheeling Bridge case this court placed its judgment upon the ground 'that congress had acted upon the subject, and had regulated the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same.'"

The court also reviewed *Wilson* v. *The Blackbird Creek Marsh Co.*, 2 Peters, 250, and the opinion in that case by Chief Justice Marshall. Blackbird Creek referred to was a small stream lying wholly within the State of Delaware, and congress had not assumed any jurisdiction over its waters, but the court says that Chief Justice MARSHALL remarked that,

"if congress had passed any law which bore upon the subject, the court would not feel much difficulty in saying that a state law, coming in conflict with such an act, would be void."

This is important, as the court recognizes the principle that if congress has passed any law which bears upon the subject of inter-state commerce upon railways, the court would have no difficulty in upholding equity jurisdiction.

In the Wheeling Bridge Company case, this court held that,

"the usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government, it has been observed."

The High Court of Chancery of England, as early as 1836, upon information and bill filed by the attorney gen

eral, granted an injunction to restrain and apprehend nuisances in a public highway. In that case the jurisdiction of the court was challenged, but after full argument and careful consideration Lord Chancellor Cottenham overruled the objections and held jurisdiction. The lord chancellor said:

"With respect to the question of jurisdiction it was broadly asserted that an application to this court, to prevent a nuisance to a public road, was never heard of. A little research, however, would have found many such instances. Many cases might have been produced, in which the court has interfered to prevent nuisances to public rivers, and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has well established jurisdiction upon a proceeding by way of information, to prevent nuisances to public harbors and public roads, and, in short, generally to prevent public nuisances."

2nd Mylne & Craig, Ch. Rep., p. 135.

The authorities are uniform in support of the principle that:

"Navigable streams between states, or extending from state to state, and used for transportation of inter-state commerce, are public highways, and that such transportation cannot be interfered with, or impeded, even under authority of state legislation; that the control of such waters for the transportation of inter-state commerce rests wholly with the general government."

Jurisdiction was not entertained for the reason that the government had a property interest in such waters, for in many cases there had been no appropriation of public moneys for the improvements of the streams, but upon the broader principle that these rivers were the great highways of the United States for the transportation of inter-state commerce, in which all the people had an interest.

In *Escanaba Co.* v. *Chicago*, 107 U. S., 682, this court, speaking by Mr. Justice FIELD, said:

"The power vested in the general government to regulate inter-state and foreign commerce, involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the states, or with foreign countries."

A distinction is made, however, between navigable streams, the waters of which form a continuous channel for commerce among the states, and other waters and rivers that lie wholly within a particular state.

Relative to the rights of the states, the learned justice said:

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority."

Again:

"It was competent for the legislature of the states to impose such regulations and limitations upon the erection of obstructions like dams and booms in navigable streams wholly within its limits, as might best accommodate the interests of all concerned, until congress should interfere and by appropriate legislation control the matter. The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of congress is exclusive of state authority only when the subjects upon which it is exercised are national in their character and admit and require uniformity of regulation affecting alike all the states. Upon such subjects only that authority

can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation." (P. 686.)

Citing:

Welton v. *State of Missouri*, 91 U. S., 275.

Henderson v. *Mayor of New York*, 92 U. S., 259.

The Daniel Ball, 10 Wallace, 557:

The United States filed a libel in the District Court for the western district of Michigan against the steamer Daniel Ball, to recover the penalty provided for want of inspection and license, as provided by the act of congress of July 7, 1838, as amended August 30, 1852. The owners of the steamer set up as a defense, that Grand river was not a navigable water of the United States, and the further defense that the steamer was not engaged in trade or commerce between two or more states, and therefore was not subject to the navigation laws of the United States, requiring licenses and inspection.

Relative to this defense the court, speaking by Mr. Justice FIELD, said:

"So far as the steamer was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more

states, does in no respect affect the character of the transaction." (P. 565.)

It was further held that the authority of congress over inter-state commerce extends to every agency in such commerce, whether that agency is confined within the limits of the state or otherwise.

"If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over inter-state commerce may be defeated."

The learned counsel for the petitioners, at the hearing in the Circuit Court, asserted that the authorities relied upon by the government did not sustain the jurisdiction of the Circuit Court, for the reason that "waterways are not "railways"; that waterways are "free to all comers," and not the subject of private ownership, while "the con- "trol of railways is primarily with the company that "owns and operates it."

It is true that the control of railways is primarily with the companies owning them, and it is also true that all railways are *quasi* public corporations, and as the great public highways of the country, have practically superseded navigable rivers as carriers of inter-state commerce. "They are free to all comers," subject only to just and reasonable charges for the services rendered. As carriers of inter-state commerce and passengers, they are subject to the control of governmental agencies, under authority of direct statutory enactment. As carriers of *intra*-state commerce, they are also subject to the control and direction of state authorities under statutory law. They are the great public highways of the United States for the transportation of commerce and passengers between the states, and any unlawful hindrance or obstruction to such

transportation, would be a public nuisance to the same extent as an obstruction to such commerce upon the navigable rivers. Whether the acts of parties, associations, or combinations amount to a public nuisance, depends entirely upon the character and extent of the obstruction, and the methods, or agencies of such transportation, are immaterial.

That railways are now the great public highways of the nation, is no longer a question of opinion or conjecture—the matter has been definitely settled by this court.

In *Cherokee Nation* v. *Kansas Railway Company*, 135 U. S., 641–57, this court, speaking by Mr. Justice HARLAN, said:

"Congress has power to regulate commerce not only with foreign nations and among the several states, but with the Indian tribes. It is not necessary that an act of congress should express in words, the purpose for which it was passed. The court will determine for itself whether the means employed by congress have any relation to the powers granted by the constitution. * * * The question is no longer an open one as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. * * * It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law."

This principle is not only recognized, but made the law by the constitution of many of the states. The constitution of the State of Illinois declares that:

"Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared pub-

lic highways, and shall be free to all persons for the transportation of their persons or property thereon, under such regulations as may be prescribed by law, and the General Assembly shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state."

Constitution of 1870, Article 11, Sec. 12.

In State Freight Tax, 15 Wall., 252, the court holds that:

"The transportation of freight or of the subjects of commerce is a constituent part of commerce itself. Transportation of passengers or merchandise through a state, or from one state to another is of this nature—commerce among the states."

(Page 275):

"Beyond all question, the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by a state was the thing desired. A power was given by the same words and in the same clause, by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market was not contemplated, for without that there could not be consummated trade either with foreign nations or among the states. In his work on the constitution (Sec. 1,057), Judge Story asserts that the manner in which the word 'commerce' is used in this instrument includes not only traffic but intercourse and navigation. And in the passenger cases (7 How., 416), it was said: 'Commerce consists in selling the superfluity in producing articles of necessity, as well as pro-

ductions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight. Nor does it make any difference whether this interchange of commodities is by land or by water. In either case, the bringing of the goods from the seller to the buyer is commerce' ".

It is further held that the Federal Government is clothed with the power and duty to regulate and protect inter-state commerce.

If, however, it shall be held that it is necessary that congress by direct legislation, should first act upon the transportation of inter-state commerce by railways, before the government can invoke the jurisdiction of a court of equity for the protection of such commerce against unlawful interference, then I respectfully submit that congress has so acted, and by direct legislative authority, the government through its appointed agency, is exercising control over such commerce in its most important and essential features.

On February 4, 1887, an "Act to Regulate Commerce" was passed and approved, and on the 2d of March, 1889, and again February 10, 1891, was amended.

The first section provides:

"That the provisions of this act shall apply to any common carrier or carriers, engaged in the transportation of passengers or property, wholly by railroad, or partly by railroad, and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States * * * to any other place in the United States," etc.

Sec. III provides:

"That every common carrier subject to the provisions of this act shall according to their respective powers,

afford all reasonable, proper and equal facilities for the interchange of traffic between their respectives lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

SEC. IV provides:

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate, for the transportation of passengers, or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line." etc.

SEC. V provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads," etc.

Section VI requires common carriers subject to the provisions of the act, to print and keep open to public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, which are in force at the time upon its route, and also provides that it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons, a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, etc.

Section VII of the act was evidently intended to facilitate the transportation of inter-state commerce without unnecessary delay or hindrance. It provides that:

"It shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract or agreement, express or implied to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination; and no breaking of bulk, stoppage or interruption made by such common carrier, shall prevent the carriage of freight from being treated as one continuous carriage, from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act."

Thus it appears that a combination between the railway companies, or their officers, to prevent by change of time schedule, or by requiring the carriage of freight in different cars, thereby delaying the transportation, and increasing the cost, is prohibited, and such combination, by other sections, would subject those combining for that purpose, to punishment by fine.

Although this prohibited combination, by the letter of the law, is confined to railways, or their officers, still it must be admitted that congress has taken direct action in respect of this matter, and having taken such action, it would seem to necessarily follow that a combination by the employes of the railways, for the purpose of preventing, hindering or delaying the transportation of inter-state commerce, would be a violation of the spirit, if not the letter of the law, and that such combination or conspiracy would be a public nuisance, and, therefore, brought directly within the inherent powers of equity; and if a public nuisance, the jurisdiction of equity may be invoked by the government itself, for the protection of public interests.

The power of congress to regulate and protect inter-state commerce upon railways must be conceded, and it is equally apparent that congress has by this statutory enactment, assumed jurisdiction over inter-state commerce by railways, and therefore, as said by Chief Justice Marshall, in the Blackbird Creek Marsh Co. case, 2 Peters, Congress having passed a law which bears upon the subject-matter, the court should find no difficulty in supporting the jurisdiction of the Circuit Court.

The inter-state commerce act was before this court for consideration and construction in *Inter-State Commerce Commissioners* v. *Brimson*, 154 U. S., 447–63. This case involved more especially the validity of the twelfth section of the act, and it was claimed that such section was unconstitutional and void.

Mr. Justice Harlan, speaking for the court, said:

"Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration. As the constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well to all controversies to which the United States shall be a party (Art. 2, Sec. 2) and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress (25 Stat., 434–866) the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the constitution."

It is true that this law confers upon the commissioners certain powers plenary in their character, but the act no-

where precludes the government from invoking the jurisdiction of equity for the proper and reasonable protection of inter-state commerce during transportation.

Under the circumstances of the present case the Interstate Commerce Commission would be powerless to protect inter-state commerce against interference or hindrance and obstruction to such commerce, resulting from the conspiracy of the respondents. The act regulating commerce does not restrict the power of the government in the slightest degree, and while it charges the commission with certain duties relative to such commerce, the government may, by independent action, protect such commerce by invoking the aid of the court, or by the adoption of any other measures authorized by law.

There would seem to be no possible doubt of the jurisdiction of chancery, on bill or information filed by the government or by the Attorney General, as the chief executive officer of the Department of Justice, to enjoin the railways carrying inter-state commerce, their officers, representatives and agents, from interrupting the transportation of such commerce, or its continuous carriage by requiring the breaking of bulk, or by any other device that would work an injury to the public.

The inter-state commerce act also confers jurisdiction upon Circuit courts to compel by *mandamus* obedience to the law, provides for commissioners, and makes annual appropriations for the support of the commission.

The City of Chicago is a terminal point of the different lines of railway referred to in the bill. The western lines, extending from the Pacific coast, here connect with eastern lines extending to the Atlantic. The inter-state commerce act requires that such lines shall form connections,

and that there shall be practically one continuous line from the Atlantic to the Pacific. Any willful infraction of this law, by the officers or representatives of either company, is made a misdemeanor. The companies are also liable in damages for such unreasonable delay. The refusal of the officers or agents of the railway companies to deliver cars carrying inter-state commerce freight, to connecting lines, would be a violation of the inter-state commerce act. The law contemplates and provides that there shall be no unreasonable or unnecessary interruption in the transportation of such commerce, and provides penalties for willful obstructions to continuous carriage. There was such interruption during the months of June and July of the summer of 1894, and a delay thereby, continuing until about the 15th of July, resulting in great public injury; there were then in the City of Chicago conditions that constituted a most aggravated public nuisance.

The bill charges that the cause of this delay was the unlawful conspiracy of the petitioners, as officers and representatives of the American Railway Union, and that such union was composed of railway employes. This charge is not denied; the overt acts charged against the conspirators are admitted; no justification is plead, and no defense whatever is made, other than the challenge of the petitioners to the jurisdiction of the Circuit Court. If this defense can be upheld, then it would seem to follow that the effect of the inter-state commerce law is to prohibit the officials of the railways from an unreasonable interruption of transportation of inter-state commerce, but to invite and encourage the railway employes to commit the same offense.

The evident purpose of the Inter-state Commerce Act, is to protect inter-state commerce while in transportation, from excessive or discriminating charges, to secure continuous carriage, and to prohibit unreasonable delay, whether resulting from devices or combinations of railways, officials, agents, or *employes*, and the prohibitions of the act in this respect apply to all classes of combinations, without exception or discrimination.

The bill may also be maintained under section IV of the Act of Congress, entitled, "An Act to Protect Trade "and Commerce Against Unlawful Restraints and Monop- "olies." (26 St. at Large, page 209.)

SEC. I declares that:

"Every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Also, "that every person who shall make any such contract, or engage in any such combination, or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

SEC. IV:

"The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain all violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the discretion of the attorney general, to institute proceedings in equity to prevent and restrain such violations."

The contention of the defendants at the hearing in the Circuit Court, was that this act was not intended to protect the public against combinations and conspiracies of employes

or laboring men, but on the contrary, that the sole and only purpose of the law was to protect the public against combinations and conspiracies of railway companies and capitalists. They admitted that under said act the court had complete jurisdiction to restrain such conspiracies and combinations of capitalists, and railway officials, on bill filed by the direction of the Attorney General, but denied that such jurisdiction could be extended to combinations or conspiracies of railroad employes, however prejudicial such combination or conspiracy might be to the public interests.

It is not denied that if the officers of all, or any of the railways named in the bill, had entered into a combination or conspiracy to hinder, delay or obstruct the transportation of inter-state commerce that such combination or conspiracy would be unlawful, and that the officers so combining together would be guilty of a misdemeanor punishable by fine or imprisonment; why, then, would not other agents or employes of said railways, entering into a similar conspiracy or combination, be guilty of the same offense? The injury to the public would be the same in the one case as in the other.

One of the objects of the law was to prevent all restraints of commerce among the several states by unlawful combinations or conspiracies, and the fourth section of the act clothes the Circuit Courts of the United States with authority and jurisdiction to prevent restraints and prohibit all overt acts of such conspirators. Many of the Circuit Courts have taken and held jurisdiction under section 4, under bills presented substantially in the same form as the one under consideration.

The learned Circuit Court judge, after reviewing the opinions of other circuit judges, as well as the Circuit

Court of Appeals of the Fifth Circuit, held that the Circuit Court had jurisdiction of the case presented, and that the injunction granted was not without authority of law, nor for any reason invalid.

In the case of *United States* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep., 994, the late Judge Billings, under this statute, granted an injunction over objection by the defendants to the jurisdiction of the court. On appeal to the Circuit Court of Appeals (57 Fed. Rep., 85) the judgment of the Circuit Court was affirmed.

Waterhouse v. *Comer*, 55 Fed. Rep., 149–56, involved the same question now under consideration. District Judge SPEER construed the act of July 2, 1890, and the inter-state commerce act, so-called, together, and held that "a combination of persons, without regard to their "occupation, which will have the effect to defeat the pro- "visions of the inter-state commerce law inhibiting dis- "criminations in the transportation of freight and pas- "sengers, and further to restrain the trade and commerce "of the country, will be obnoxious to severe penalties. "This will apply with even greater force to persons in "the employ of the railroads concerned."

In contempt proceedings against Phelan, 62 Fed. Rep., 804, Judge Taft also held jurisdiction under Sec. 4, of the act of 1890. Phelan was a member of the American Railway Union, was one of the parties to the conspiracy to boycott the Pullman cars, and was assigned to duty at Cincinnati. Following the directions of Debs and others directors, he pursued the general methods of the union with the avowed purpose of obstructing the operation of all railways that refused to assist in the boycott.

Circuit Judge TAFT held that:

"Such combination, its purpose being to paralyze the inter-state commerce of the country, is an unlawful conspiracy within the act of July, 1890, declaring illegal every contract, combination, or conspiracy, in restraint of trade or commerce among the several states."

The rule of construction applied to Sec. 4, by the Circuit Courts, seems to be in harmony with the rules of statutory construction adopted by this court in many reported cases.

General rules are:

(*a.*) "The popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions."

(*b.*) "Statutes are to be interpreted to give effect to all their words, when such interpretation is reasonable and consistent with their provisions and objects."

(*c.*) "General words are controlled by specifications, but not by inference, or limitations, or implication, unless necessary and irresistible."

Maillard v. *Lawrence*, 16 How., 248.

Gelpcke v. *City of Dubuque*, 1 Wallace, 220.

United States v. *Bassett*, 2 Story, C. C., 389.

In *United States* v. *Coombs*, 12 Peters, 72, it is said that "upon the general principles of interpreting statutes, where the words are general, the courts are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs, of the enactments."

Again, in *United States* v. *Babbitt*, 1 Black, 61: "What is implied in a statute, is as much a part of it as what is expressed."

The contention of the petitioners' counsel, at the hearing in the Circuit Court, was that the statute of July 2,

1890, does not confer a right on the government to proceed, under the direction of the Attorney General, to abate a public nuisance existing in a highway of inter-state commerce, and in the petition filed in this court counsel aver that said act "has no application or reference to such facts and conditions as are in said bill stated, and confers no jurisdiction whatever upon the Circuit Courts of the United States in respect of the matters and things in said bill set forth."

In passing upon this question the learned Circuit Judge said:

"It is the duty of the court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions, interpreted by the settled rules of construction."

"That the original design to suppress trusts and monopolies created by contract or combination in the form of trust, which of course would be of a 'contractual character,' was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words 'or otherwise.' It may be that those words should be deemed to include only forms of like character—that is to say, some form of contract as distinguished from tort; but, if that be so, it only emphasizes and makes imperative the inference, which otherwise it seems to me would be sufficiently clear, that the word 'conspiracy' should be interpreted independently of the preceding words. It is hardly to be believed that the words 'or otherwise' were used simply for the purpose of giving fuller scope to the antecedent words 'contract' and 'combination,' and then 'conspiracy' added merely for the same purpose. Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of trade or commerce; but that construction is controlled by the title, which shows that only unlawful

restraints were intended. But what constitutes an unlawful restraint is not defined; and, under the familiar rule that such Federal enactments will be interpreted by the light of the common law, I have no doubt but that this statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a 'contractual character,' should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word 'conspiracy' is neither necessary, nor, as I think, permissible. To do so would deprive the word of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase 'in restraint of trade,' when used —as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. A distinction has been suggested between the phrase "in restraint of trade" and the phrases "to injure trade" and "to restrain trade." Though perceptible, the distinction does not seem to me so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any contract, combination, or conspiracy, to be "in restraint of trade," must involve the

use of means of which the effect is "to injure" or "to restrain" trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination or conspiracy to restrain or injure trade. It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint; and whether the means should be avered to have been used "in restraint of" or "to restrain" trade could hardly be important. There are many cases, doubtless, in which the rule that every word of a statute should be given effect is inapplicable, because, when synonymous words are used, the court is powerless to give them different meanings; but, when words of different significance are employed, the rule forbids that the scope of the statute be compressed within the limits of the narrower word. "Drinking house" and "tippling house" are necessarily one, and it was well held in *Reg.* v. *McCulley*, 2 Moody, Cr. Cas. 34, that "ram, ewe, sheep, and lamb" were all covered by the word "sheep," but if the words had been "ram, ewe or sheep," it would have been a plain violation of the rule to reject the comprehensive word "sheep," and say that the lambs or wethers were not included. *Rice* v. *Railroad Co.*, 1 Black, 379; *Gelpcke* v. *City of Dubuque*, 1 Wall., 220; *Farrell* v. *Martindale*, 2 Cranch, 10, 337; *U. S.* v. *Coombs*, 12 Pet., 72; *Maillard* v. *Lawrence*, 16 How., 251; *Market Co.* v. *Hoffman*, 101 U. S., 115; *Thursley* v. *U. S.*, 113 U. S., 313, 5 Sup. Ct., 491. And it is more legimate here to reject the word "conspiracy," or, what is practically the same thing, strip it of its well settled criminal significance, by confining it within forms of contract, or of combinations in the form of trusts. For like reasons I am unable to regard the word "commerce," in this statute as synonymous with "trade," as used in the common law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and sale of goods, wares and merchandise, either by wholesale or retail," and so it is used in

the phrase mentioned. But "commerce" is a broader term. It is the word in that clause of the constitution by which power is conferred on congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const. U. S., Art. 1, § 8. In a broader and more distinct exercise of that power than ever before asserted, congress passed the enactments of 1887 and 1888 known as the "Inter-state Commerce law." The present statute is another exercise of that constitutional power, and the word "commerce," as used in the statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution. That meaning has often been defined by the Supreme Court. * * *

Within the proper subjects of equitable cognizance, as established when the constitution was adopted, it was competent for congress to vest the courts with the jurisdiction granted by this section, and to impose upon them the duty of its exercise in proper cases. Just as, in construing the first section of the act, its general words are limited by force of the title to unlawful restraint, and the words "in restraint of trade," in their connection with the words "contract" and "combination," are to be given their common law significance, so the jurisdiction in equity, though given in broad and general terms, will be deemed to be limited so as not to extend to a case which is not of equitable cognizance. Indeed, if the sixth section of the act may legitimately be used in aid of the construction of the first section, the fourth section warrants, if it does not require, that the first section be restricted to cases in which, in accordance with established precedent, an injunction could issue,—a limitation which would not be essentially uncertain or of difficult application, and which, if necessary to the upholding of the statute, might well be adopted.

That this case is one of equitable character is clear, and, as I understand, has not been questioned by counsel; their contention being that neither by this statute, nor upon general principles, is the case within the jurisdiction of a Federal court.

The facts of this case suggest illustrations of the impropriety as well as inconsistency of putting upon the stat-

ute the restrictive construction proposed. If, for example, the manufacturers of other sleeping cars, in their own interest, should enlist the brakemen and switchmen or other employes of the railroads, either individually or in associated bodies, in a conspiracy to prevent or restrain the use of Pullman sleepers, by refusing to move them, by secretly uncoupling or by other elusive means, the monopolistic character of the conspiracy would be so evident that, even on the theory that the statute is aimed at contracts or combinations intended to engross or monopolize the market, it would be agreed that the offense ought to be punishable. But in such a case if the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakeman or switchman be exempt? Can workmen, or, if you will, poor men, acting by themeives, upon their own motion and for their own purposes, whether avowed or secret, do things forbidden by the statute, without criminal responsibility, and yet be criminally responsible for the same things done at the instance and to promote the purposes of others? Or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal? If that be so, then, if a capitalist and one who is not a capitalist join in doing things forbidden by this statute, neither can be punished, because one alone cannot be guilty of conspiracy. The persistent efforts of the defendants, as the proof shows, was to force the railroad companies—the largest capitalists of the country—to co-operate, or at least to acquiesce, in a scheme to stop the use of Pullman sleepers: and for a time they had the agreement of a manager and other officers of one road to quit the use of the obnoxious cars, and perhaps a qualified submission of the officers of another road or two to the same dictation. Does the guilt or innocence of the defendants of the charge of conspiracy under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary co-operation with them, from whatever employment or walk in life. * * *

The act of congress of July 2, 1890, is entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies."

Sec. 2 declares that "every combination or conspiracy in restraint of commerce among the several states or with foreign nations is hereby declared to be illegal."

The purpose of the act is protect commerce among the states from all illegal restraints.

The bill charges that the American Railway Union and the defendants, who were the directors of such Union, threatened to hinder, delay and obstruct commerce among the states.

The popular, or received import of the words "restraint of commerce" is a hindrance to the physical movements of such commerce. The movement of the railway trains, and the trains themselves were a constituent part of such commerce, and any delay of such movements would, in the language of the statute, be a restraint of commerce among the states, and inasmuch as Congress have, by the several inter-state commerce acts, assumed to control and protect inter-state commerce upon the railways, it would seem to follow that the government may invoke the jurisdiction of equity for all needful protection of the public rights in that behalf.

IV.

THE COURT HAD JURISDICTION TO ENJOIN AND RESTRAIN THE DEFENDANTS FROM HINDERING OR OBSTRUCTING THE CARRIAGE OF THE UNITED STATES MAILS.

We assume it will be admitted that the transportation or carriage of the mails is one of the most important func-

tions of the government, and that the most important agencies of such transportation are the various railways of the United States. Congress has made many laws for the protection of the mails while in the possession of the government, and by direct enactment prohibits all obstruction of transportation.

The bill charges that said railways were employed and required by the United States, and under obligations through the laws of the United States, to continuously and daily, carry upon their regular trains the mails, and are also required to have definite hours of departure and delivery.

We assume that it will not be denied that the government, like any other party, may invoke the jurisdiction of equity for the necessary protection of its property interests, as well as its right of possession.

The learned counsel for the petitioners will admit that the government has a property interest, at least to the extent of the value of the mail bags, and it cannot be denied that it also had the right of exclusive possession of the mail bags, as well as their contents. As a matter of fact, each and every letter, from the time it is deposited in the mail box provided by the government for its reception, until its delivery to the party or persons addressed, is wholly, and exclusively, within the control of the officers and agents of the government.

Chief Justice TANEY, in *Searight* v. *Stokes et al.*, 3 How., 151 (U. S.), speaking for the court, said:

"The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property, as well as that of its citizens committed to its care, for a very large portion of the

letters and packages conveyed on this road, especially during the session of congress, consists in communications to or from the officers of the executive department, or members of the legislature, on public service, or in relation to matters of public concern. * * * We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact."

Pensacola Telegraph Company v. *Western Union Telegraph Co.*, 96 U. S., 1.

On the 24th of July, 1866, congress passed an act entitled, "An Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." This act authorizes any telegraph company organized "under the laws of any state of this union", to construct, maintain and operate telegraph lines over any portion of the public domain of the United States. It provided that the officers and agents of the United States should, in their transmission of telegraphic communications over the lines of any of said companies, have priority over all other business, "and shall be sent at rates to be annually fixed by the postmaster general."

This was the only benefit, or special interest that would accrue to the government from this grant to the companies of the privilege of constructing the lines over the public domain. The legislature of the State of Florida, by statute, granted exclusive privileges to the Pensacola Telegraph Company, and when the Western Union Company commenced the construction of its line, the Pensacola Company filed its bill to enjoin the work, and use of the line about to be constructed, on account of the alleged exclusive right of the plaintiff under its charter. Upon the hearing, a decree was passed, dismissing the bill, and an

appeal prayed to this court. Chief Justice Waite delivered the opinion of the court.

Appellant contended that inasmuch as Congress had not acted upon the matter, the state law would control, and that by virtue of such law, an injunction would lie, restraining the Western Union Company from constructing and operating its line.

In answer to this proposition, the court said:

"It is unnecessary to decide how far this might have been done if congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect amounts to a prohibition of all state monopolies in this particular. It substantially declares in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege."

The jurisdiction assumed by Congress over telegraph lines by the statute of July 1866 is much less in extent and scope, than the jurisdiction assumed over inter-state commerce upon railways by the inter-state commerce acts.

The court further said (page 9):

"Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of congress, because, being national in their

operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

United States v. *Beebe*, 127 U. S., p. 338, was a suit in equity, brought by the Attorney-General on behalf of the United States, to set aside and cancel certain patents issued in favor of the defendant Beebe, in 1838-39, for about 480 acres of land, upon which the present city of Little Rock, Arkansas, is partly built. The bill was filed in January, 1883, in the United States Circuit Court, for the Eastern district of Arkansas. The bill asked for a decree, setting aside and canceling the patents, on the ground that at the date of their issue, and for a long time prior thereto, the United States did not own the land embraced in them, but on the contrary, that said lands had been legally appropriated by other persons.

One of the defenses relied upon in the trial court, was want of authority in the Attorney-General to file a bill for the annulment of the patents, also that the United States had no equity to maintain the suit. It was also plead as a defense that the claim sued upon was stale, and barred by the statute of limitations. This last defense prevailed. The bill was dismissed for want of equity, and the case brought to this court upon appeal by the United States.

The court, however, sustained the authority of the Attorney-General to bring the suit. Mr. Justice LAMAR, speaking for the court, said:

"It may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued by mistake, or obtained by fraud, where the government has a direct interest, or is under an obligation respecting the relief invoked." (Citing the opinion of the court delivered by Mr. Justice Miller in *San Jacinto Tin Co.* v. *United States*, 125 U. S., 273.) "If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent."

The recognized principle here is that the Attorney General has the right to institute a suit in the name of the United States, whenever, in his opinion, it becomes necessary for the protection of the property interests of the government, and also where the government is prevented "from fulfilling an obligation incurred by it, either to the public, or to an individual."

This right did not arise from any express statute on the subject, nor did the court look to statutory authority, but on the contrary, said that this right has long been authoritatively settled upon principle. Applying this principle to the existing conditions charged in the bill, it

must be admitted that the threatened acts of the defendants would work a prejudice to the rights of the United States, and would prevent the government from fulfilling the obligations incurred by it, to carry safely, and without delay, the United States mails, by means of the railway agency it has adopted, and therefore the government may invoke the aid of chancery for the protection of the public interests in that behalf.

It cannot be reasonably anticipated that the learned counsel will attempt to support their charge that the petitioners were "tried on the charge of having violated said injunction, by the said court, without jury," contrary to the Constitution of the United States, either by argument or authority.

The hearing of the contempt proceedings was upon information, bringing to the attention of the court the fact that the defendants had repeatedly, and willfully, violated its order of injunction, and upon this information, the hearing was had and the order entered.

The rule is so well and authoritatively settled that: "The court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end," that reference to adjudged cases, as was said by Mr. Justice MILLER, would be an "affectation of learning."

The defendants were not enjoined from entering into any criminal conspiracy or combination, but on the contrary were only restrained from the commission of certain acts, that if committed, would work a public wrong or injury, as well as an injury to the property of the government. The order of injunction was in aid, and for the protection, of public rights and property. The

purpose of the bill, and the object of the government, was not to preserve the public peace by injunction, or to enjoin violations of the penal code of the United States—these matters are left entirely to the domain of the common law.

By fair inference, the petitioners admit that the directors of the American Railway Union, after the service of the writ of injunction, "violated the penal code of the United States," and therefore claim that the hearing under the information for contempt should have been suspended, and that their trial should have been under indictment.

If it be true that the petitioners have committed a crime against the United States, their constitutional privileges will not be denied them, but on the contrary, they will be accorded "a speedy and public trial by an impartial jury of the state and district wherein the crime was committed," in strict accordance with the provisions of the Sixth amendment to the constitution. The court, however, is now dealing with civil, and not criminal jurisdiction. In the exercise of such jurisdiction by the Circuit Court no wrong was done the defendants. By the writ of injunction no property, civil, or personal rights of the directors of the American Railway Union were invaded, nor were they restrained of the full and free exercise of all such rights and privileges.

The order of injunction only required that the defendants should observe and respect public rights, as well as the property rights of the government; that they should desist from hindering or interfering with commere among the states, and with the transportation and possession of the United States mails.

Clearly the government is clothed with power to enforce its laws, and to execute its functions, in all cases within the jurisdiction of the United States.

In *Ex parte* Siebold, 100 U. S., p. 371-95, the court, speaking by Mr. Justice BRADLEY, said:

"We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places, does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. 'This constitution and all laws which shall be made in pursuance thereof, shall be the supreme law of the land.' * * * It must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons; and to do this it must necessarily have power to command obedience, preserve order and keep the peace; and no person or power in this land has a right to resist or question its authority so long as it keeps within the bounds of its jurisdiction."

United States v. *Duluth*, 1 Dillon, 469, was a bill in chancery in the Circuit Court brought by the United States by the attorney for the district of Minnesota, acting under the direction of the Attorney-General, for an injunction against the defendants.

The right of the United States to come as a party plaintiff into her own courts, to seek protection for her own interests, was not denied. Mr. Justice MILLER said:

"If the allegations of the bill be true, we have no

doubt of the right of the officers of the Federal government to bring this suit in the name of the United States to protect her rights, and deem it a much more appropriate mode of doing so than by the physical force of the war department."

If the allegations of the bill in the present case are true, then it became the duty of the government to protect its rights, certainly in the United States mail, and to defend such possession and unobstructed transportation by calling to its aid the Federal troops, or any other authorized physical force. The government, however, adopted the more peaceful method of coming into her own courts for aid and protection as "a much more appropriate mode, than by the physical force of the war department."

The authority of the government and the jurisdiction of her courts are openly challenged by the petitioners, and it is now the duty of this court to finally and authoritatively determine the jurisdiction of the Circuit Court, as well as the power of the government under the constitution and the law.

For the purpose of this hearing, the charges made in the bill are admittedly true. Immediate protection of public rights, and the property rights of the government was imperative.

Similar conditions are likely to arise in the future, and to this court is now committed the all important question—important to all the people irrespective of party, calling, or occupation—what are the powers of the government, and how shall they be executed?

Respectfully submitted.

EDWIN WALKER,
Special Asst. U. S. Atty.

CHICAGO, March, 1895.

In the Supreme Court of the United States.

EX PARTE: EUGENE V. DEBS ET AL., PETITIONERS.

BRIEF OF AMICUS CURIÆ.

In the Supreme Court of the United States.

EX PARTE: EUGENE V. DEBS ET AL., PETITIONERS.

BRIEF OF AMICUS CURIÆ.

Petitioners ask for a writ of *habeas corpus*, and also for a writ of error with a *supersedeas*.

They are in jail in Illinois, having been committed by final judgment in a contempt proceeding, which proceeding was commenced by information filed July 17, 1894, in the circuit court of the United States for the northern district of Illinois. The contempt charged and found consisted in disobedience to an interlocutory order of that court in an equity suit therein pending, to which suit petitioners were parties defendant; namely, an injunction order against certain acts threatened by them in connection with the late "Pullman strike." They claim that the court was without jurisdiction to make either said judgment or order, and that the question involved is a constitutional one.

The question here before the court is whether either or both of the remedies sought is the proper one. It is not understood that the constitutional question is to be con-

sidered upon its merits on this application, and it is assumed for the purposes of this discussion that a constitutional question is necessarily involved in petitioners' case.

The undersigned appears by leave of court as *amicus curiæ*.

I.

It is undoubted that before the Circuit Court of Appeals Act of March 3, 1891, c. 517 (Supp. to Rev. Stat., p. 903), a writ of *habeas corpus* was the proper remedy in all cases where petitioner was confined for alleged contempt under an order of court which was void for lack of jurisdiction.

That act, however, greatly extended appellate jurisdiction:

> That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error *final decision* in the district court and the existing circuit courts in *all cases* other than those provided for in the preceding section of this act, unless otherwise provided by law. (§ 6.)

Constitutional cases are among those "otherwise provided for," and come to this court direct under the preceding section.

Petitioners concede the possible application of this act to contempt proceedings by asking for a writ of error in the alternative.

Among the questions which their petitions raise are the following:

Is this final order, judgment, or decree, in contempt a "final decision" in a "case" within the meaning of the section above quoted?

If so, is a writ of *habeas corpus* any longer a proper remedy?

Is the remedy under section 6 by writ of error or appeal?

II.

A contempt proceeding very similar to the present, so far as appears by the report, has been treated by this court as "a final judgment or decree" in a "suit."

The jurisdiction to review proceedings in State courts by writ of error is exercised under section 709 of the Revised Statutes, which applies only to "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had."

In *Eilenbecker* v. *Plymouth County* (134 U. S., 31) the question came up as follows: Plaintiffs in error were enjoined, by a writ issued by the district court of Plymouth County, in the State of Iowa, from selling or keeping for sale any intoxicating liquors; they refused to obey the writ; the injunction was a "preliminary" or interlocutory one; "complaints were filed," charging them with contempt, upon which a rule to show cause was granted; a hearing was had upon affidavits before the court without a jury; they were found guilty, and a "judgment" of fine and imprisonment was entered. The "judgment" was affirmed by the supreme court of Iowa on *certiorari*, and to the judgment of affirmance a writ of error was prosecuted to the Supreme Court of the United States. This court considered the case on its merits, and affirmed.

The court (Mr. Justice Miller) say that whether the proceeding "is in itself essentially a criminal proceeding

or not, we do not find it necessary to decide" (p. 39). It has been so termed in *Ex parte Kearney*, 7 Wheat., 38, 43; *Ex parte Peters*, 3 Pet., 193, 208; *New Orleans* v. *Steamship Company*, 20 Wall., 387, 392; and on this ground was not appealable before 1891 at least. (*Hayes* v. *Fischer*, 102 U. S., 121.)

In *McMicken* v. *Perin*, 20 How., 133, and *Newport Light Company* v. *Newport*, 152 U. S., 527, 538, on the other hand, it is said that such an order is not a judgment. The act of 1891 uses broader language—"final decision."

For other recent discussions of what a "case" is, see *Fong Yue Ting* v. *United States*, 149 U. S., 698, 728, 729; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447.

It may be suggested that such a contempt order is not a final but an interlocutory decision, so that the writ of error or appeal if it lie at all must lie from the final decree, and that this was overlooked in the Eilenbecker case. It may be said, on the other side, that a writ of error or appeal under such limitations would often be of no avail; that the person held in contempt is often not a party; that the action may be one at common law to which such a practice would be entirely strange; that the person held in contempt often has served his term years before the final decree; that, on the other hand, the contempt order may be later than that decree, even if the disobedience were to an interlocutory order. It may also be noticed that in the present case the proceeding was practically a separate one, commenced formally by information instead of attachment or order to show cause; but,

on the other hand, the rights of the prisoner should be the same whatever form of paper was used to bring him before the court.

It is not intended to argue in favor of the appellate jurisdiction. If there be such a jurisdiction it may lead to great annoyance. The question is raised by these petitions, however, and must be considered.

III.

In recent cases the court have impliedly stated that *habeas corpus* will not lie where there is a remedy by writ of error or appeal. (*In re Tyler*, 149 U. S., 164, 180; *In re Swan*, 150 U. S., 637, 648).

On the other hand the court has still more recently granted a *habeas corpus* in case of a void sentence of imprisonment which could, however, have been corrected upon writ of error. (*In re Bonner*, 151 U. S., 242.)

And at the present term the court has said that *habeas corpus* will lie when a writ of error is an available remedy, but only in exceptional cases. (*New York* v. *Eno*, 155 U. S., 89.)

The rule seems to be similar to that governing original applications to this court since the statute allowing appeals from orders of the circuit court denying the writ. (See *In re Mirzan*, 119 U. S., 584, 586; *In re Sawyer*, 124 U. S., 200; *Medley, petitioner*, 134 U. S., 160; *In re Burrus*, 136 U. S., 586.)

Here the court still interferes occasionally by original writ in cases where it is shown that an application to the circuit court in the first instance would be merely dilatory, because the act complained of is an act of the circuit court itself, or for some analogous reason.

So, where petitioner is held under State process, the court has interfered in cases of great hardship, such as *In re Loney*, 134 U. S., 372, as explained in *New York* v. *Eno*, *supra*, at p. 96. There, otherwise, he might have served a long term of imprisonment before the case could have got so high up in the State courts that a writ of error from Washington could reach it.

Where a writ of error is a remedy equally effective in procuring immediate release, it is questionable whether a petition for *habeas corpus* should ever be entertained. The latter is a more troublesome proceeding, more likely to be embarassed by obscure distinctions between mere errors and jurisdictional defects. Moreover, petitioner, on being denied a *habeas corpus* on the ground that the questions were not strictly enough jurisdictional in character, might afterwards seek a review by writ of error.

At least where petitioner's case is not perfectly clear in his own favor, and where he does not deny his ability to procure bail, it would seem that a writ of error with *supersedeas* is as prompt a remedy as the other. It may be advanced and heard as quickly if the case is difficult enough to call for careful preparation. The supersedeas may be obtained at Chicago without waiting to come to Washington.

IV.

There has never before been any appellate jurisdiction over contempt proceedings.

If such jurisdiction has been granted, is it to be by writ of error or appeal? Analogies in practice to an equity suit might seem to point to the latter, which would give a

wider range to the appellate tribunal. The practice under the former would be a little anomalous. Still, while presenting the question to the court, it is submitted that petitioners' practice in applying for the writ of error is the correct one, if the appellate jurisdiction exists at all. The proceeding is criminal in nature, and should, it seems, be so treated.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.